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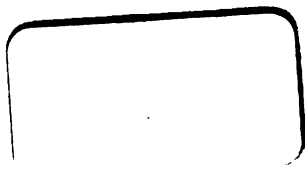
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29
WASHINGTON REPORTS

VOL. 53

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

APRIL 28, 1909—JUNE 30, 1909

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SUPREME COURT OF WASHINGTON

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ERRATA

Page 214, line 9 from bottom, for chapter 127 read chapter 124

Page 215, line 2 from top, for chapter 127 read chapter 124

Page 309, 4th syllabus, line 5, for vendor read vendee

ERRORS NOTED IN PREVIOUS VOLUMES

VOLUME 50

Page 86, add at foot of page, *Charles E. Patterson* and *James M. Gephart*, for respondents *Coffin et al.*

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 7562. Decided April 28, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Kenneth
Mackintosh, Prosecuting Attorney for King County,*
Respondent, v. GEORGE P. ROSSMAN,
*Appellant.*¹

ATTORNEY AND CLIENT—DISBARMENT—GROUNDS—BARRATRY—PERJURY. The commission of the crimes of barratry or perjury is ground for the disbarment of an attorney.

CONSTITUTIONAL LAW—CIVIL RIGHTS—ATTORNEYS—DISBARMENT—BARRATRY. LAWS 1903, p. 68, making the personal solicitation of employment by an attorney barratry and ground for disbarment, is a reasonable restriction upon the right to practice law, which is a privilege and not a natural right; and is not, therefore, in derogation of the 14th amendment guaranteeing the liberty of the citizen to engage in lawful occupations.

ATTORNEY AND CLIENT—DISBARMENT—JURY—RIGHT TO TRIAL. A proceeding to disbar an attorney at law, under Bal. Code, §§ 4776, 4777, is in the nature of a civil action, in which a trial by jury is not required.

Appeal from a judgment of the superior court for King county, Morris, J., entered July 10, 1907, after a trial on the merits before the court without a jury, disbaring the defendant as a practicing attorney at law. Affirmed.

Jackson Silbaugh, for appellant.

Kenneth Mackintosh and *John C. Higgins*, for respondent.

¹Reported in 101 Pac, 357.

MOUNT, J.—This appeal is prosecuted from an order of disbarment. The state upon relation of the prosecuting attorney of King county filed forty-four charges against the appellant, who was an attorney at law authorized to practice in this state, and prayed for his disbarment. The cause was tried to the court without a jury, and the appellant was found guilty on thirty-three of the charges. No evidence was offered in support of ten of the charges. Twenty-one of these charges of which he was found guilty were charges of barratry; one was a charge of perjury, one of slander against the wife of a deceased partner; the others were charges of fraud practiced by appellant upon clients and solicitors employed by him for the purpose of soliciting business.

It will not be necessary to set out these findings. The findings are correct beyond doubt. They show that the appellant had little or no conception of honest or fair dealing, and no regard for truth, or for his oath as attorney at law. He now admits a violation of the act of 1903, Laws 1903, page 68, defining barratry, but insists that no offense was committed, for the reason that the act is unconstitutional and void, being in derogation of the fourteenth amendment of the constitution of the United States, and art. 1 of the state constitution, which guarantee certain natural rights to citizens. It is argued that this act deprives the appellant of the right to liberty and the pursuit of happiness, for the reason that he has selected the profession of law as a lawful occupation, and that "liberty in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation." Several cases are cited as supporting this position, among them being *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798, 68 L. R. A. 889; *Russell*, Police Power, pp. 34, 35; *Lawton v. Steele*, 152 U. S.

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133, 14 Sup. Ct. 499, 38 L. Ed. 385; Black, Const. Lim. § 204, and others.

None of these authorities are in point in this case. Many general statements are made therein, to the effect that citizens have not surrendered certain natural rights, such as the right to life and property, and to earn a livelihood in any lawful way, and that these rights cannot be taken away by legislative enactment. These are general statements. They do not mean that any citizen may pursue any occupation, whether lawful or not, or that he may acquire property or hold it unlawfully or wrongfully. Even life, liberty, and property may be taken away from the citizen for the commission of crime or by due process of law. While it is true that the practice of law is a lawful occupation in itself, it is not a natural right or a right guaranteed by the constitution. It is a privilege granted by the state, and may be surrounded with whatever restrictions the legislature may in reason prescribe. 4 Cyc. 898 *et seq.*; 3 Am. & Eng. Ency. Law (2d ed.), p. 287; Weeks, Attorneys, p. 72; even to the extent of requiring an attorney, without compensation, to conduct the defense of destitute persons accused of crime. *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876.

The power of disbarment is possessed by all courts which have authority to admit attorneys to practice; but it can be exercised only where there has been such conduct by attorneys as shows them unfit to be members of the profession, such as securing employment by false representations, or attempting to represent adverse interests, or for the violation of the oath as an attorney, and such like offenses. *State ex rel. Dill v. Martin*, 45 Wash. 76, 87 Pac. 1054. If an attorney at law may be deprived of his right to practice his profession for these offenses, he certainly may be deprived thereof for the commission of crimes such as perjury and barratry. Barratry was a crime at the common law. 3 Am. & Eng. Ency. Law (2d ed.), pp. 859-861. It was a crime under the territorial laws which continued in force after

statehood. The act of 1903, page 68, amended the old law by providing, among other things, that,

"If any attorney or counselor at law shall seek or obtain employment to prosecute or defend in any suit or case at law or in equity by means of personal solicitation of such employment or by procuring another to solicit such employment for him, or shall by himself or another seek or obtain such employment by giving to the person from whom such employment is sought, money or any other thing of value, . . . he shall be deemed guilty of barratry, and shall upon conviction be punished by a fine in any sum not exceeding five hundred dollars, and may in addition thereto be imprisoned . . . and any attorney at law violating any of the provisions of this act shall, in addition to the penalty hereinbefore provided, forfeit his right to practice in this state, and shall have his license revoked and be disbarred in the manner provided by law for dishonorable conduct or malpractice, whether he has been convicted for violating the act or not."

This statute is not the same as the old common law definition of barratry, but defines the crime and makes certain acts criminal. From the earliest times, one of the penalties for this offense when committed by an attorney has been disbarment. Weeks, Attorneys (2d ed.), § 86; 3 Am. & Eng. Ency. Law (2d ed.), p. 681. This statute makes it unlawful for any attorney to personally solicit certain employment, or to employ others to solicit such employment for him. If we are correct in our conclusion that the privileges of an attorney may be surrounded with such reasonable restrictions as the legislature may prescribe, it necessarily follows that, when certain acts are made unlawful or criminal, an attorney may not lawfully commit such acts, and may not to that extent practice his profession; for this does not, as we have seen, take away from him any natural right guaranteed him by the constitution. We think the act is a legitimate exercise of legislative power.

Appellant urges that the court erred in not ordering a trial by jury. The statute provides a special proceeding in

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Statement of Case.

this class of cases. Bal. Code, §§ 4776, 4777 (P. C. §§ 3198, 3199). The proceeding is in the nature of a civil action. *In re Waugh*, 32 Wash. 50, 72 Pac. 710; Weeks, Attorneys, § 83; 4 Cyc. 912. No jury was demanded, and none was required. In addition to the charges of barratry, which are admitted by the appellant, the court found, and the record shows, other grounds amply sufficient to sustain the judgment of the court disbarring the appellant. But we prefer to rest the decision of the case upon the validity of the statute defining barratry. The judgment was clearly right, and is therefore affirmed.

RUDKIN, C. J., CROW, DUNBAR, and FULLERTON, JJ., concur.

[No. 7425. Decided April 29, 1909.]

F. B. GOETTER *et al.*, Respondents, v. BENJAMIN P. MOORE
et al., Appellants.¹

ADVERSE POSSESSION—PAYMENT OF TAXES—COLOR OF TITLE—SHERIFF'S CERTIFICATE OF SALE. A sheriff's certificate of sale upon mortgage foreclosure, delivered to the purchaser, is color of title, and with payment of taxes for seven years, in good faith, constitutes a title by adverse possession of vacant and unoccupied lands, as against the foreclosure defendants, and also their wives who were not made parties to the foreclosure, where they all had acquiesced in the decree, and had not been in possession, or paid any taxes, or made any claim to the land, for twelve years.

Appeal from a judgment of the superior court for Stevens county, Kennan, J., entered December 28, 1907, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action to quiet title. Affirmed.

L. B. Nash, for appellants Burns and Clark.

Slater & Allen, for appellants Moore and Slater.

W. H. Jackson and *Jesseph & Grinstead*, for respondents.

¹Reported in 101 Pac. 365.

CROW, J.—Action by Frank B. Goetter, Fannie E. McCauley, Cora M. Armstrong, and George G. Vivian, against Benjamin P. Moore, Cyrus R. Burns, Mary E. Burns, his wife, and others, to quiet title to certain real estate in Stevens county. From a decree in favor of the plaintiffs, the defendants have appealed.

The respondents, F. B. Goetter, Fannie E. McCauley, Cora M. Armstrong, and George G. Vivian, original plaintiffs, and L. E. Jesseph and Mrs. L. E. Jesseph, his wife, cross-complainants, also respondents, claim different portions of the same forty-acre tract. Their respective titles, so far as the controlling points in this action are concerned, are identical in character, being subject to the same alleged defects, and will be considered together. The same statement is pertinent to the appellants, who severally claim undivided interests under alleged titles identical in character.

The entire tract was patented by the United States government in November, 1887, to one Henry C. Kinsley, a minor, then about six years of age, of whose person and estate one Jacob Stitzel was the duly appointed, qualified, and acting guardian. About May, 1890, Stitzel, as such guardian, under an order of court, sold the forty-acre tract to the appellant Benjamin P. Moore, who purchased for himself and, also, in trust for the respondent George G. Vivian and the appellants Cyrus R. Burns and Ralph L. Clark. Vivian was one of the plaintiffs below and is a respondent here. At the time of the commencement of this action, he claimed the interest which he now pleads, under the chain of title pleaded by the other respondents, and not under that pleaded by the appellants.

On May 26, 1890, Benjamin P. Moore, a single man, executed and delivered to Stitzel, as guardian, an unpaid purchase money note and mortgage on the land. The note and mortgage, not having been paid at maturity, were on October 27, 1890, cancelled and surrendered to the appellant Benjamin P. Moore, who thereupon executed and delivered

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to Stitzel, as guardian, a renewal note and mortgage for the same amount. On July 14, 1891, Moore executed and delivered to Burns, Clark, and Vivian, deeds for an undivided one-fourth interest in the land, to each of them, subject to the mortgage, and also a deed for his own undivided one-fourth interest to the appellant John B. Slater, as trustee for the benefit of creditors of the Stevens County Bank.

Thereafter, on August 17, 1893, Jacob Stitzel, as guardian of the person and estate of Henry C. Kinsley, a minor, commenced an action in the superior court of Stevens county, against Benjamin P. Moore, Ralph L. Clark, George G. Vivian, Cyrus R. Burns, John B. Slater, as trustees of the Stevens County Bank, an insolvent corporation, and others, as defendants, to foreclose the renewal mortgage above mentioned. The record shows that Burns and Clark were then married men; that the land was their community property, and that their wives were not made parties to the foreclosure action. Thereafter a decree of foreclosure was entered, and an order of sale was issued to the sheriff of Stevens county, who, on March 31, 1894, sold the land to Jacob Stitzel as guardian of the person and estate of Henry C. Kinsley, and made return of his proceedings, showing the sale and the execution and delivery of a certificate of sale to Stitzel, as guardian. Kinsley reached the age of majority in 1902; whereupon Stitzel, as guardian, made his final account and conveyed the land to him. From Kinsley all of the respondents, including the respondent Vivian, have since deraigned title by mesne conveyances. None of the foregoing facts are disputed by any of the parties.

The respondents further claimed that a certificate of sale was actually executed and delivered to Jacob Stitzel, as guardian, by the sheriff of Stevens county; that it was never recorded and cannot now be found; that Stitzel, as guardian, immediately entered into the exclusive possession and control of the land; that he, his grantee, Kinsley, and all grantees of the latter, including the respondents, have since been in con-

tinuous, open, and notorious possession of the land, in good faith, claiming the same adversely and under color of title, and that they have since paid all taxes levied and assessed thereon. These facts, although disputed by the appellants, were found by the trial court. Appellants now contend, that they were not shown by the evidence; that Stitzel, as guardian, was never in possession; that he and his grantees never obtained, held, or had any certificate of sale, or other color of title, made in good faith, and that they did not pay all taxes on the land.

Our conclusion from all the evidence is that it does tend to support the finding that Stitzel, as guardian, and Kinsley and the respondents, as his successors in interest, were in continuous and adverse possession at all times since 1894; but the evidence on that point being somewhat weak and vigorously disputed, we will assume, for the purposes of this decision, that it does not sustain the finding as to adverse possession. The findings that the certificate of sale was executed and delivered, that the respondents and their grantors claimed the land in good faith under color of title, and that they had paid all taxes thereon for more than seven years continuously, prior to the commencement of this action, are unquestionably sustained by the preponderance of the evidence. The evidence also shows that the appellants have, none of them, been in possession or paid any taxes on the land since the sheriff's sale in 1894. By their long-continued inactivity, and their failure to take possession, pay taxes, or assert title, they impliedly acquiesced in the foreclosure and sale, of which they had actual knowledge. It appears from the record that some of them compromised and settled a deficiency judgment entered against them therein without attacking its regularity or validity. Their course of action indicates that they regarded their interests as having been lost by the foreclosure and sale, and they never made any contention to the contrary, for the period of about twelve years, and until after the respondents had commenced this action to

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quiet their title. The foreclosure decree recites service upon all of the defendants therein, and is regular upon its face. It directed the sale afterwards made by the sheriff, in pursuance of which a certificate of sale was executed and delivered. Assuming the land to have been vacant and unoccupied, as contended by the appellants, yet, under Bal. Code, § 5504 (P. C. § 1161), the other facts found by the trial court and sustained by the preponderance of the evidence, are sufficient to vest the complete fee simple title in the respondents. They have shown (1) color of title made and claimed in good faith, and (2) payment of taxes for more than seven successive years. It is conceded that no sheriff's deed was issued, and there is no evidence of any order confirming the sheriff's sale. Yet the certificate of sale was executed and issued. Under repeated holdings of this court such a certificate constituted color of title. *Olsen v. Howard*, 38 Wash. 15, 80 Pac. 170; *Johnson v. Bartlett*, 50 Wash. 114, 96 Pac. 833. In *Philadelphia Mortgage & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501, this court, at page 464, said:

"A proceeding which, if valid, will give to an execution purchaser of land, a substantial title, as well as all the rights and privileges which follow title, ought, when invalid, if pursued in good faith under a belief and claim of right, to give color of title sufficient to start in motion the statute of limitations; and in the case before us we are constrained to hold that the sheriff's sale conferred on the appellant such color of title as to enable it to claim the benefit of the statute involved here."

The certificate of sale being color of title under which the respondents and their grantors did, for more than seven consecutive years, prior to the commencement of this action, claim title in good faith, and pay all taxes levied and assessed against the land, their title is absolutely established under the provisions of Bal. Code, § 5504, *supra*.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, CHADWICK, DUNBAR, and FULLERTON, JJ., concur.

[No. 7523. Decided April 29, 1909.]

SANDSTONE BRICK & LIME COMPANY, *Respondent*, v. JAMES
T. LAWLER, *Appellant*.¹

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—VENDOR AND PURCHASER—CONTRACTS. Where, by the terms of a contract to purchase land, a cash payment of \$19,000 is to be made in 90 days, time is made of the essence, an abstract of title is to be furnished and five days allowed for examination, and if the title is not good or cannot be made good within sixty days the contract is to be void and earnest money refunded, parol evidence is inadmissible to show an understanding that one-ninth of the title was held by minor heirs whose interest was to be acquired by probate proceedings, and that the abstract was not to be furnished until such title was acquired; as the contract cannot be varied by parol, and there is no such ambiguity in the contract as to permit parol evidence to explain it.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 28, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

M. M. Lyter, for appellant.

James McNeny, for respondent.

MOUNT, J.—The appellant and respondent entered into the following contract:

"\$1,000. Seattle, Wash., February 2nd, 1907.

"Received of the Sandstone Brick & Lime Co., hereinafter mentioned as the purchaser, the sum of one thousand dollars as earnest money, and in part payment for the purchase of certain real estate in Snohomish county, state of Washington, and particularly described as follows, to wit: The south half of northeast quarter of section five, township thirty north, range seven east W. M., which contains the deposit of limestone situated on the Moe homestead together with any and all improvements thereon, which we have this day sold to the said purchaser for the sum of forty thousand dollars (\$40,000) on the following terms, to wit: One thousand dollars

¹Reported in 101 Pac. 360.

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(\$1,000) as hereinabove receipted for, nineteen thousand dollars (\$19,000) cash in hand within ninety days from date hereof; ten thousand (\$10,000) cash in hand within nine months from date hereof; ten thousand dollars (\$10,000) in capital stock of the purchaser when sale is completed. Rents and interest on mortgages, if any, are to be apportioned from date deed is delivered. The risk of loss or damages to said premises by fire, until delivery of deed, is assumed by seller to the limit only of amount allowed by the insurance companies. An abstract of title is to be furnished, and five days' time allowed for examination thereof. It is agreed that if the title to said premises is not good, or cannot be made good within sixty days, this agreement is void, and the earnest money here receipted for shall be refunded. But if the title to said premises is good, and the purchaser neglects or refuses to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to the owner of said premises, and this contract shall as to both parties become null and void. The property is to be conveyed by good and sufficient deed of conveyance, free and clear of all liens and incumbrances of every nature whatsoever. It is understood that the purchaser shall have a reasonable time after the expiration of the ninety days above mentioned to pay the nineteen thousand dollars (\$19,000) above referred to in the event that the inclemency of the weather prevented an examination of the property. James T. Lawler.

"Time is the essence of this contract.

"I hereby agree to purchase said property on the above terms and pay \$40,000 as specified above. Sandstone Brick & Lime Co., Purchaser."

The respondent, on the date of the contract, paid to the appellant the \$1,000, as therein stated. The appellant never furnished to respondent an abstract of title to the land. The title was not good and was not made good. On April 8, 1907, after the expiration of sixty days from the date of the contract, the respondent demanded the return of the \$1,000. Appellant refused to return the money. Thereupon respondent brought this action to recover the same. Upon the trial, these facts appearing, the trial court entered judgment as prayed for.

The defendant appeals, and alleges that the court erred in refusing to permit him to show, in substance, that at the time the agreement was entered into, the parties knew that the title to the land was in Mr. Lawler, but that his interest therein was only an option to purchase 24-27 thereof; that the remaining 3-27 belonged to the minor heirs who resided in Snohomish county; that it was understood between the parties that it would take longer than sixty days to acquire the interests of such heirs, and that it was agreed that the abstract referred to should not be delivered until after the interest of the minor heirs had been acquired; that immediately after the date of the contract, the appellant proceeded to acquire the title of the heirs by probate procedure, but before the same could be accomplished, the respondent, on April 8, 1907, notified appellant that it would not take the property, by reason of the fact that the land did not contain certain limestone which it was thought to contain at the time the contract was entered into. The court refused to permit this evidence, upon the ground that its effect was to vary the terms of the written contract. We think the court was right in so holding. The contract provides that the deferred payment, \$19,000, shall be paid "within ninety days from date hereof; ten thousand dollars (\$10,000) cash in hand within nine months from the date hereof," and that "an abstract of title is to be furnished and five days' time allowed for examination thereof. It is agreed that if the title to said premises is not good or cannot be made good within sixty days this agreement is void, and the earnest money here receipted for shall be refunded." Time is made the essence of the contract.

It seems reasonably clear, from the face of the contract, that the sixty days' time in which to make the title good began to run from the date of the contract, viz., Feb. 2, 1907. The contract becomes ambiguous only when an attempt is made to construe the sentence "an abstract of title is to be furnished and five days' time allowed for examination thereof," so as to permit some indefinite time for furnishing the abstract. But

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if the parties intended such indefinite time for that purpose, it is not clear why time should have been made the essence of the contract, or why the time of payments should have been definitely fixed; for it was certainly not the intention of the parties to pay three-fourths of the purchase price, or \$30,000, before it was known that the title was a good one or could be made good. The clear intention is that the \$1,000 shall be paid, and refunded if title could not be made good. When the contract is read as a whole, the intention of the parties that the title should be made good within sixty days from its date seems clear. We think there is no such ambiguity in the contract as required evidence to explain it. The contract contemplates that the abstract shall be furnished at once, and five days' time given for an examination thereof. If the title is not good and cannot be made good within sixty days, the contract is void.

The offer of evidence to show that the parties understood at the time the contract was made that the abstract could not be furnished until after the period of sixty days had expired, in effect, was to vary the terms of the contract. If the parties so understood and intended, they should have so stated in the contract. The contract itself is the best evidence of their understanding at the time it was made, and cannot now be varied by oral evidence. The appellant does not contend that the respondent refused the land and demanded the return of his money within the sixty days' time. The demand for the money and refusal to take the land was after the expiration of the time fixed by the contract, when it became void. We are of the opinion, therefore, that the trial court was right.

The judgment must be affirmed.

RUDKIN, C. J., FULLERTON, DUNBAR, and CROW, JJ., concur.

[No. 7412. Decided April 29, 1909.]

N. GAVAZZA, *Respondent*, v. W. H. PLUMMER, *Appellant*.¹

CORPORATIONS—OFFICERS—PERSONAL LIABILITY—CONTRACTS—PRINCIPAL AND AGENT. A treasurer of a corporation is personally liable upon a contract wherein he agreed with the subscriber to the capital stock of the corporation, that "I will, upon demand, accept a return of his stock, and refund to him the money he has paid," on certain conditions, although to his signature he affixed "Treas"; since that was *descriptio personae* only, and an agent may become personally bound by the form of his promise.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 14, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

Plummer & McDermot and *Gallagher & Thayer*, for appellant.

G. W. Sommer, for respondent.

MORRIS, J.—The only question involved in this appeal is, Can the appellant be held to a personal liability upon the following contract:

"Spokane, Wash., May 3d, 1906.

"I, W. H. Plummer, treasurer of the Spokane Show Case and Cabinet Co., do hereby agree with Mr. N. Gavazza that, in consideration of his subscription for five hundred (500) shares of the capital stock of the Spokane Show Case and Cabinet Co., I will, upon demand, accept a return of his stock and refund to him the money he has paid therefor, as follows: Two hundred and fifty dollars (\$250) within one year, and two hundred and fifty dollars (\$250) within eighteen (18) months after he shall exercise his option to return said stock. Notice of which shall be mailed in writing delivered to me. W. H. Plummer, Treas."

Upon both principle and authority there can be only one answer to this question, and that is that he can.

¹Reported in 101 Pac. 370.

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"It is too well settled to need any reference to authorities to show that an agent may, by the form of the promise and manner of his signature fix upon himself a personal liability." *Haverhill Mut. Fire Ins. Co. v. Newhall*, 1 Allen 180.

The appellant has brought himself within this rule. The words of his undertaking "I will, upon demand, accept a return of his stock and refund to him the money he has paid," would seem to indicate, irrespective of the application of the rule, that it was his purpose and intention to become personally bound, at least to lead respondent to infer (as respondent testified) that the obligation was personal. The addition of "Treas." to his signature neither adds to nor detracts from that obligation; it is simply, as the courts say, "*descriptio personae*."

If it is desired to escape personal liability in the contract of an agent or other representative, the intention so to do must be expressed in clear and explicit language; otherwise, a personal obligation arises. *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529. And this is so even though he is known to be an agent, and acts avowedly as such. *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. 193, citing Story, Parsons, and numerous other cases.

In the case of *Barker v. Mechanic Fire Ins. Co.*, 3 Wend. 94, a note reading: "I, John Franklin, president of the Mechanic Fire Insurance Company, promise to pay," etc. was held to be the note of John Franklin. The court says: "He describes himself as president of the company, but he should have contracted in their name or in their behalf." So here appellant describes himself as "treasurer" of the company, but he does not contract in the name of, or in behalf of, the company. The contract is in the name of and on behalf of himself.

The judgment is affirmed.

RUDKIN, C. J., CROW, GOSE, CHADWICK, PARKER, and MOUNT, JJ., concur.

[No. 6824. Decided April 29, 1909.]

OLYMPIA BREWING COMPANY, *Respondent*, v. PIONEER
MUTUAL INSURANCE ASSOCIATION, *Appellant*.¹

INSURANCE—ACTIONS—PLEADINGS—REPLY—ISSUES AND PROOF—SCOPE OF GENERAL DENIAL—UNNECESSARY AFFIRMATIVE DEFENSE—PREMIUMS—POLICY—WAIVER OF CONDITION REQUIRING PAYMENT. In an action upon a fire insurance policy in which the defendant answered that part of the premium was past due and unpaid, under a policy providing that the company was not liable for a loss occurring in such case, a general denial in the reply permits, as within the issues, evidence on the part of the plaintiff that the company waived payment of a portion of the premium and extended a credit for the balance due, irrespective of an affirmative defense in the reply that the original contract called for payment of the premium in installments; hence failure of the plaintiff to prove such affirmative defense is immaterial where, under the general denial, it proved the waiver; such a waiver keeping the policy in force.

SAME—BURDEN OF PROOF. In such a case, the burden of proof is upon the defendant to show that part of the premium was unpaid and past due.

INSURANCE—POLICY—LIMITING AMOUNT OF LOSS. Under the terms of a policy of fire insurance and Laws 1903, p. 147, limiting liability for loss by fire to three-fourths of the actual value of bar fixtures, \$280, judgment for the full sum is excessive, and should be reduced to \$210.

COSTS—ON APPEAL—DECISION—EXCESSIVE JUDGMENT—OBJECTIONS BELOW. Upon appeal from an excessive judgment for a loss by fire, being for the full value rather than three-fourths of the value of the property insured, in which the judge was in doubt as to the evidence of value and requested a transcript of the evidence, the appellant will not be allowed costs on reversal of the judgment because excessive in amount, where the excess was not called to the attention of the trial court below.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 10, 1906, upon findings in favor of the plaintiff, in an action to recover upon a fire insurance policy. Modified.

Granger & Magill, for appellant.

Pierre P. Ferry and *Frank A. Steele*, for respondent.

¹Reported in 101 Pac. 371.

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Opinion Per CROW, J.

CROW, J.—This action was commenced by the Olympia Brewing Company, a corporation, against the Pioneer Mutual Insurance Association, a corporation, upon a policy of insurance, to recover for a loss sustained by fire. From a judgment in favor of the plaintiff, the defendant has appealed.

Appellant makes two contentions: (1) that at the time of the fire the premium had not been paid; that the policy by its express terms provided that appellant should not be liable for any loss that might occur to the property insured, while the premium or any portion thereof remained past due and unpaid; and (2) that the judgment was excessive.

The policy was issued to one C. N. Kinney, who, after the fire, assigned his claim to the Olympia Brewing Company. The cause was tried without a jury, and the trial court, in substance, found that on May 18, 1904, in consideration of a premium of \$36.75 to be paid by C. N. Kinney, the appellant delivered to him a policy, whereby it insured him for one year from that date against loss or damage by fire, for the sum of \$500, on the stock of liquors and cigars, and \$500 on the bar fixtures, in his saloon in Kitsap county; that Kinney at the time paid appellant \$10 on account of the premium; that on June 16, 1904, he made another partial payment of \$10, at which time the appellant waived the provision in its policy as to time of further payment of the premium, and extended a credit to Kinney; that on June 25, 1904, the property was completely destroyed by fire; that the value of the liquors and cigars was \$825; that the value of the bar fixtures was \$280; that proofs of loss were made; that at no time prior to the filing of its answer herein did the appellant claim its non-liability by reason of Kinney's failure to pay the remainder of the premiums, and that subsequent to the fire Kinney had assigned his claim on the policy to the respondent. The trial court also made and entered the following conclusion of law:

"That the plaintiff is entitled to a judgment against the defendant for the sum of \$780, less the sum of \$16.75, the

balance of the premium due and unpaid at the time of the fire; together with the interest on said sum of \$763.25 from the 11th day of July, 1904, until paid at the rate of six per cent per annum and its costs and disbursements in this action expended."

From a careful examination of the evidence, we conclude that each and all of the above findings should be sustained. Appellant requested the following findings of fact, which were refused:

"That the policy sued upon provided, among other things, that the association should not be liable for any loss or damage that might occur to the property insured, while the premium, or any portion thereof, remained past due and unpaid. . . . That at the time of the fire and loss referred to in the plaintiff's complaint, a portion of the premium on the policy sued upon was past due and unpaid."

Appellant now contends that the trial court erred in refusing such requested findings, and also erred in finding that appellant had waived the provision of its policy as to any premium remaining past due and unpaid. It insists that the finding so made was without the issues, and vigorously contends that appellant in its answer alleged the premium was due when the policy issued, but that a portion thereof was past due and unpaid at the time of the fire; that respondent by its reply denied this allegation, and affirmatively alleged that, when the policy was issued, the agreement was for payment of the premium in monthly installments of \$10 each; and further alleged that the two installments maturing prior to the fire had been paid; that it failed to sustain such alleged agreement on the trial because Kinney testified to an agreement whereby it was stipulated that he should have sixty days within which to pay the premium, and appellant directs our attention to the fact that the trial judge in announcing his oral decision, in part, said:

"I don't think the evidence establishes the contention of the plaintiff that there was sixty days' time in which to make this

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payment. Outside of the testimony in this case it seems that the circumstances show such not to have been the case."

The substance of appellant's contention is, that the trial judge held it to have been estopped from pleading its non-liability, and that such holding was erroneous, for the reason that it was not authorized under the issues of the case, the respondent having failed to plead any facts upon which it relied to show estoppel. In this connection appellant cites numerous authorities to sustain the well-established rule that an estoppel to be available as a defense should be pleaded. Manifestly the appellant misconstrues the pleadings and issues. It relies upon its affirmative defense, in which it alleges (1) that under the express terms of the policy it should not be liable for loss occurring while any part of the premium remained past due and unpaid, and (2) that a portion of the premium was past due and unpaid at the date of the fire. The respondent denied that any portion of the premium was past due at the date of the fire, thereby tendering an issue under which it could introduce any affirmative evidence tending to negative the allegation of the answer. Its further plea of affirmative facts in the reply tending to show the premium could not have been past due because it was to be paid in monthly installments, was unnecessary. The making of such an affirmative plea did not have the effect of compelling respondent to rely upon it alone, nor was it a waiver of respondent's right to introduce competent evidence under the general issue, to negative the allegations of the answer. *Armstrong v. Musser Lumber etc. Co.*, 43 Wash. 584, 86 Pac. 944; *Ryan v. Lambert*, 49 Wash. 649, 96 Pac. 232; *Brown v. Wisner*, 51 Wash. 509, 99 Pac. 581.

To sustain appellant's affirmative defense, it was necessary to show, not only that part of the premium was unpaid, but also that it was past due. This it failed to do. Competent evidence was admitted, under respondent's denial, sufficient to sustain the finding of the trial court to the effect that, on June 10, 1904, when Kinney made the second partial pay-

ment, the appellant waived the provision of its policy as to time of further payment, and extended a credit to him. Such finding was unquestionably within the issue raised by the denial of the reply, as it negatives appellant's allegation that at the date of the fire a portion of the premium was past due. The conclusion of law therefore follows that the policy was in force at the date of the fire, and that the respondent is entitled to recover.

The appellant further contends that the amount of recovery was excessive; that the policy made a separate provision for \$500 insurance on the bar fixtures, the value of which was found to be \$280; that under the terms of the policy, and the provisions of § 4, chap. 97, Laws 1903, p. 147, it was not liable for more than three-fourths of the actual value of the property insured, which would be only \$210 on the bar fixtures, but that the trial court erroneously allowed \$280. This was called to the attention of the trial judge when he delivered his oral decision in respondent's favor, at the close of the evidence. He did not then finally fix the sum to be allowed on the bar fixtures, being in doubt as to what the evidence had shown, but requested the appellant to furnish, within the next day or two, a transcript of the evidence on that point. It does not appear that this was done, or that the court's attention was again called to the subject. The evidence actually sustains appellant's contention, and the recovery on bar fixtures should not exceed \$210. The entire record satisfies us that only the correct amount of loss would have been allowed had the evidence been furnished to the trial judge as requested. No further action was taken for the period of almost ten months, when the findings were presented. At that time appellant should have called attention to this mistake in the amount of recovery, and should have requested its correction. The record fails to show that it did so. This being true, we do not think the appellant should recover costs on this appeal.

The judgment will be modified by deducting the sum of

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Citations of Counsel.

\$70, so that respondent will recover \$698.25, with interest from July 11, 1904, and costs in the superior court. Neither party will recover costs on this appeal.

RUDDIN, C. J., MOUNT, GOSE, CHADWICK, and PARKER, JJ., concur.

[No. 7453. Decided May 1, 1909.]

JOHN W. HASTIE *et al.*, *Respondents*, v. JOHN JENKINS *et al.*,
Appellants.

E. F. SCHROCK *et al.*, *Respondents*, v. JOHN JENKINS *et al.*,
Appellants.

THE COULEE LIVE STOCK COMPANY, *Respondent*, v.
JOHN JENKINS *et al.*, *Appellants*.¹

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error in the admission of evidence in an equitable case is harmless.

WATERS AND WATER COURSES—WHAT ARE—LAKES—OBSTRUCTION—INJUNCTION—DAMAGES—EVIDENCE—SUFFICIENCY. A dam causing the overflow of lands bordering upon a depression, swamp or lake, is an unlawful obstruction of a natural water course, and not a mere protection against surface waters, where it appears that the depression or lake was practically a continuation of, and received the overflow from, another lake, and that the water course had a well defined channel, was the natural outlet of the lakes, and was the only means of discharging the waters thereof during high water season; and such obstruction will be enjoined, with damages for its maintenance.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered October 5, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to enjoin the obstruction of a water course, and for damages. Affirmed.

W. A. Reneau and Hannan & Clapp, for appellants. A ditch for drainage of surface water is not a water course.

¹Reported in 101 Pac. 495.

Anderson, Dictionary of Law, p. 1108; 30 Am. & Eng. Ency. Law (2d ed.), p. 347; *Hawley v. Sheldon*, 64 Vt. 491, 33 Am. St. 941; *Simmons v. Winters*, 21 Ore. 35, 27 Pac. 7, 28 Am. St. 727; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *O'Connor v. Fon du Lac etc. R. Co.*, 52 Wis. 526, 9 N. W. 287, 38 Am. Rep. 754; *Lessard v. Stram*, 62 Wis. 112, 22 N. W. 284, 51 Am. Rep. 715; *Chicago etc. R. Co. v. Morrow*, 42 Kan. 339, 22 Pac. 413. The water must usually flow in a certain direction and in a regular channel with banks and sides. *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314; *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. 859; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Ellis v. Pomeroy Imp. Co.*, 1 Wash. 572, 21 Pac. 27. Water flowing not within a water course, as legally defined, or standing upon the surface of the land, is surface water and a landowner may retard its flow or dam it up without being liable in damages. *Rowe v. St. Paul etc. R. Co.*, 41 Minn. 384, 43 N. W. 76, 16 Am. St. 706; *Cario etc. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Hoyt v. Hudson*, *supra*; *Johnson v. Chicago etc. R. Co.*, 80 Wis. 641, 50 N. W. 771, 27 Am. St. 76, 14 L. R. A. 495; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Imles v. Springfield*, 65 Mo. 119, 17 Am. Rep. 645; *Missouri Pac. R. Co. v. Keys*, 55 Kan. 205, 40 Pac. 275, 49 Am. St. 249; *Chadeayne v. Robinson*, 55 Conn. 345, 11 Atl. 592, 3 Am. St. 55; *Franklin v. Fisk*, 13 Allen 211, 90 Am. Dec. 194; *Gannon v. Hargadon*, 10 Allen 106, 87 Am. Dec. 625; *Cass v. Dicks*, *supra*; *Noyes v. Cosleman*, 29 Wash. 635, 70 Pac. 61, 92 Am. St. 937; *Sullivan v. Johnson*, 30 Wash. 72, 70 Pac. 246; *Darlington v. Board of Commissioners*, 75 Kan. 810, 88 Pac. 529. A water course is a living stream with defined banks and channel fed by other and more permanent sources than mere surface waters. *Jeffers v. Jeffers*, 107 N. Y. 650, 14 N. E. 316; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519. There must always be a substantial indication of a stream which is ordinarily

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and most frequently a moving body of water. *Hill v. Cincinnati etc. R. Co.*, 109 Ind. 511, 10 N. E. 410; *Briscoe v. Drought*, 11 Ir. C. L. Rep. 25; *Ashley v. Wolcott*, 11 Cush. 192; *Shields v. Arndt*, 4 N. J. Eq. 234; *Schlichter v. Phillipy*, 67 Ind. 201. Overflow waters in time of freshets from a pond, created by melting snow or falling rains is surface water. *Bowlsby v. Spear*, 2 Vroom 351, 86 Am. Dec. 216; *Brandenberg v. Zeigler*, 62 S. C. 18, 89 Am. St. 887, 55 L. R. A. 414; *Müller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Güfllan v. Schmidt*, 64 Minn. 29, 66 N. W. 126, 58 Am. St. 515, 31 L. R. A. 547; *Sheehan v. Flynn*, 59 Minn. 486, 61 N. W. 462, 26 L. R. A. 632; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Goodale v. Tuttle*, 29 N. Y. 459; *Frazier v. Brown*, 12 Ohio St. 294; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350; *Guesnard v. Bird*, 33 La. Ann. 796; *Meixell v. Morgan*, 149 Pa. St. 415, 24 Atl. 216, 34 Am. St. 614; *Dayton v. Rutherford*, 128 Ill. 271, 21 N. E. 198.

Danson & Williams and *M. B. Malloy*, for respondents.

DUNBAR, J.—The plaintiffs in the above entitled causes brought three separate actions in the superior court of Douglas county, against the above-named defendants, primarily for a mandatory injunction and for damages incident to the wrong sought to be redressed by the action. By consent of all parties, the cases were consolidated. The plaintiffs were all owners of lands in the Grand Coulee, in Douglas county, Washington, and the gist of the three actions was the same and, as the appellants contend, was based upon the same facts, which were set out in four paragraphs of each of the complaints, as follows:

“(3) That Steamboat Lake at all times hereinafter mentioned was and now is a natural lake, situate in said county and state, and that the waters of said lake flow out of said lake through a natural water course known as ‘Outlet Creek.’

“(4) That prior to the erection of the dam hereinafter

described, said water course was sufficient to and did carry the water out of said lake at all times, and said waters did not and would not now if said creek was unobstructed by said dam overflow the above described lands or any part thereof.

“(5) That the above described lands are situated on and lie along the shore of said lake, and that prior to the erection of the dam hereinafter described said lands were elevated above the ordinary high water level of said lake.

“(6) That heretofore, to wit, on or about the 10th day of December, 1904, the said defendants without the consent and against the protest of plaintiffs erected a dam over and across said Outlet Creek, and that said defendants did thereby obstruct the natural flow of water in said creek and lake to back up and overflow, inundate and submerge a greater portion of said land, to wit, about 400 acres thereof, and that defendants ever since have and do now maintain said dam.”

Upon the trial of the cause, judgment was entered for damages in different amounts to the different plaintiffs, and an injunction was granted in favor of all the plaintiffs.

It is urged by the appellants that the court erred in receiving certain testimony. But this assignment is not pertinent, for this being an equitable action, all testimony which should not have been admitted in the case will be disregarded by this court. The other errors are based upon the findings of fact, it being claimed that the court erred in making certain of the findings, and in its conclusions of law therefrom.

The important contention of the appellants is that the waters which were thrown back upon respondents' land were not the waters of any lakes or water courses, but were surface waters which the appellants had a right to protect themselves against, and that all damages which accrued to the respondents by reason of such protection were *damnum absque injuria*. But an examination of this testimony convinces us that the facts found by the court were fairly justified by the evidence adduced at the trial; that it was established that Devil's Lake when very full overflowed into what was called Steamboat Lake, which was practically a contin-

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uation of Devil's Lake, and that Steamboat Lake found its outlet into Outlet Creek, the creek upon which the appellants erected their dam, which was the cause of the backing of the water over the lands of the respondents.

The testimony shows conclusively that Outlet Creek was the only means by which these lakes could divest themselves of water during the high water season. The contention of the appellants is, that this lake was nothing but a swag or depression, and that it was not in any sense a lake, and that Outlet Creek was not in any sense a water course; that to be a water course a stream must have a well defined, substantial existence; that it must possess that unity of character by which the flow on one person's land could be identified with that on his neighbor's land, and that there is a broad distinction between a regular flowing stream and an occasional and temporary outburst of water, which in times of freshets fills up low places and runs over and inundates adjoining lands; citing authorities to sustain that position, which is probably correct. As we have seen, the testimony in this case shows that this was a water course and an outlet of this lake. It does not matter whether it be called a swag, or a swamp, or a creek, or whether its course is straight or crooked. The channel in this case was shown to have well defined banks, and it was shown that the creek was the natural outlet for the water of the lakes, and that the waters flowing through said channel all reached a common place.

This case, it seems to us, is very much like the case of *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425, although that was an action to prevent the diversion of water, where, in speaking of Clover Creek, it was said:

"Having a bed, banks and current, it is a natural water course, even although it may, at times, be dry;"

citing Gould on Waters, § 41.

"Both Spanaway Creek and Upper Clover Creek are virtually conceded to be natural streams of water, and the mere

fact that their united volume spreads out into a broad sheet with currents, covering a large area of low ground to which the appellation of swamp or lake has been given, does not deprive them of their character as water courses."

Upon the question of whether a given body of water is a lake or pond or river, Gould, in his work on Waters, § 79, says:

"The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake, nor does a lake lose its distinctive character because there is a current in it for a certain distance tending towards a river which forms its outlet. On the other hand, the fact that a river broadens into a pond-like sheet with a current does not deprive it of its character as a river. . . . this question cannot be answered by ascertaining what appellations have been given to it."

In the above mentioned case we also cited *Case v. Hoffman*, 84 Wis. 438, 54 N. W. 793, 36 Am. St. 937, 20 L. R. A. 40, where it was held that the fact that a stream spread over wide reaches of marshes and swamps, on or below the surface, did not militate against its being a water course in every essential particular, so long as it could be identified as the same stream.

Angell on Water Courses, § 330, after laying down the general proposition that any one who obstructs water in such a manner as to cause it to overflow the land of riparian proprietors and other landowners above is responsible for all damages caused thereby, concludes:

"The law upon this subject as thus laid down, has never been called in question, and is so well settled and so obviously just, that if one tenant in common upon which a mill is situated, erects a dam below on the same water course, upon his several estate, and thereby flows the common property to the injury of his cotenant, the latter may maintain an action against him."

In view of these and other authorities which all sustain the same rule, and under the testimony in this case, we are

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forced to the conclusion that the waterway which was dammed by the appellants was a water course which they had no right to obstruct. We think that it cannot be reasonably questioned but that the respondents were entitled to an injunction in this case. This question was also decided in *Rigney v. Tacoma Light & Water Co.*, *supra*; *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. 710; *Madson v. Spokane Valley Land & Water Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 5; *Treat v. Bates*, 27 Mich. 390; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287.

That the respondents were entitled to whatever damages they proved had been inflicted upon them by the action of the appellants in this character of a case will not be disputed, and we think the testimony warrants the judgments rendered in that particular.

The judgment is therefore affirmed.

RUDKIN, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

[No. 7619. Decided May 1, 1909.]

A. G. NESS, *Appellant*, v. GEORGE BOTHELL, *Respondent*.

GEORGE BOTHELL *et al.*, *Respondents*, v. A. G. NESS, *Appellant*.¹

APPEAL—REVIEW—PLEADINGS—AMENDMENTS. In an equity case tried *de novo* on appeal, it is not error to permit the amendment of the answer to conform to proof received without objection.

APPEAL—PRESERVATION OF GROUNDS—OBJECTION. Error cannot be alleged in the consolidation of actions for trial, or to allowing amendments to conform to the proofs, where the record shows that no objections were made below.

APPEAL—RECORD—STATEMENT OF FACTS—REVIEW—EVIDENCE. The judgment will not be disturbed on questions of fact in an equity case, where the certificate to the statement of facts shows that all of the evidence which was before the lower court is not brought up on appeal.

¹Reported in 101 Pac. 702.

Appeal from a judgment of the superior court for King county, W. H. White, Esq., judge *pro tempore*, entered April 2, 1908, upon findings in favor of the defendants in an action for an accounting, consolidated with an action by defendants to establish a lien. Affirmed.

Homer E. Turner and *W. R. Bell*, for appellant.

Chas. M. Fouts and *Kitt Gould*, for respondents.

DUNBAR, J.—The above entitled actions were originally begun separately but, at the time of the trial, were consolidated by order of the trial judge. The first action, No. 59,670 in the lower court, was begun by appellant, A. G. Ness, to establish the fact that a copartnership existed between himself and the respondent George Bothell, and after that fact, to enforce an accounting between the copartners, and to obtain such relief as would be incident thereto. George Bothell appeared and, answering, denied the existence of the copartnership, but did not ask for any affirmative relief. Upon the trial of the case, the judge decided that no partnership relation existed between the respondent and appellant as to the subject-matter in controversy, and that the appellant was entitled to no relief. Afterwards the court allowed the respondent to amend its answer, setting up services rendered by respondent for the appellant, and judgment was given in favor of George Bothell and son against appellant, in the sum of \$287.82. The second of said causes, numbered 59,671 in the court below, was instituted by the respondents George Bothell and son, for the purpose of establishing a mechanics' or laborers' lien upon certain logs upon which respondents claim to have performed labor. Appellant denied that respondents had performed the labor set forth in the complaint, and denied the right of the respondents to claim the lien. Upon the trial of the cause, the court found that the respondents had, in fact, performed the services al-

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leged in the complaint, and that they were entitled to a lien upon the logs in controversy, and to a decree foreclosing the same. From the judgment and decree entered in the two causes as consolidated, this appeal is prosecuted.

The assignments are, that the court erred (1) in permitting the filing of the amended answer; (2) in rendering judgment in cause No. 59,670 in favor of the respondent; (3) in giving the respondent any affirmative relief in said cause No. 59,670; (4) in finding that no copartnership existed between appellant and respondent; (5) in rendering judgment in cause No. 59,671, and in finding that the respondents were entitled to a lien upon the logs in controversy; (6) in rendering judgment for foreclosure in favor of respondents in cause No. 59,671; (7) in refusing to grant the motion of the appellant for a nonsuit at the close of the trial of the cause No. 59,671.

The court did not err in permitting the filing of the amended answer. It has been the uniform ruling of this court that, in an equity case which is tried *de novo* here, the case will be tried upon the testimony, and the pleadings will be considered amended to meet the requirements of the testimony.

"In equity cases, if evidence is introduced without objection which would entitle a party to relief, the decision will be based upon it, without regard to the pleadings which are treated as amended." *Davis v. Hinchcliffe*, 7 Wash. 199, 34 Pac. 915.

"The question whether the complaint was or was not amended to correspond with the facts proven, is of no moment here. If there is a variance between the allegations and the proofs, this court is obligated by the statute to treat the complaint as amended, since the case comes to this court as one tried on its merits in which the appellant had full opportunity to present his defense." *Cunningham v. Lakin*, 50 Wash. 394, 97 Pac. 447.

It is insisted by the appellant that this answer completely changed the causes of defense, and injected altogether a

new issue into the trial of the cause. But the record shows that in the first answer the respondent was content to deny the allegations of the complaint, and made no demand for relief. Under the statute, there is no mandatory provision requiring the defendant to demand relief, but the answer did not give notice of the issues which were to be tried in relation to the offset or counterclaim. Paragraph 4 of the affirmative answer is as follows:

"That at the same time, the plaintiff and this defendant entered into a contract whereby this defendant agreed with plaintiff to fell, cut and log the cedar timber located upon said premises, and deliver the same in the Samamish river in said county at Wright's Landing, and the plaintiff did then and there agree to pay this defendant for the cutting, felling, and logging of said cedar timber a reasonable and the going price for the same."

This allegation was denied by the reply. In addition to this, while the appellant states that this answer was permitted to be filed over his objections, the record shows that no objections were made, and that no objection was made to the consolidation of the two cases by the appellant. Page 18 of the transcript, after rehearsing other orders and proceedings, says:

"And thereupon the defendants rested, and the court considering that A. F. Bothell had an interest in the subject-matter of both actions, and that all the matters in controversy should be determined and settled in a single action, and in order to expedite such settlement and to prevent costs, ordered that said action No. 59670 and said action 59671 be and the same are consolidated, and the court further ordered that parties to said action as consolidated be allowed to amend their pleadings to correspond to the proof herein, and the further consideration of the consolidated action was continued to April 2, 1908."

This record seems to be undisputed.

The respondent moves to dismiss this appeal for the reason, among other things, that, as shown by the certificate of the

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judge, the appellant failed to have transcribed and certified to this court in the statement of facts all the evidence that was taken in such causes in the trial court. The certificate of the judge is to the effect that the statement is as follows:

"I do further certify that the aforesaid statement of facts and amended statement of facts contain all the material facts, matters and proceedings heretofore occurring in said cause No. 59671, and not a part of the records herein. I do further certify that the foregoing statement of facts does not contain all the evidence introduced in said cause No. 59670."

So it will be seen that the statement of facts does not contain all the material facts and evidence offered in the case, for the record shows that it was stipulated in open court that the evidence in 59,670, so far as applicable, should be considered evidence in 59,671. It must follow that, if the evidence in 59,670, which is not certified to, was a part of the evidence in 59,671, then there is no proper certificate of the evidence in 59,671. In addition to this, upon the consolidation of the cases, they became one case in effect. But whether this question be considered with reference to the motion to dismiss or on the merits of the case, the result is the same. All the questions raised by the appellant, with the exception of the question in relation to the filing of the amended answer, are questions which depend upon the evidence. In an equity case the duty of this court is to ascertain what the rights of the parties are under the evidence, and it will be impossible to do that if the evidence is not all here. The plain contemplation of our statute as to appeals in equity is that the whole case as presented to the court below should be brought here before the court gets jurisdiction to in any manner interfere with the decree rendered in said court. *Smith v. State*, 5 Wash. 273, 31 Pac. 865. The appellant is seeking in a consolidated case to bring before this court a part of the evidence, and, under the uniform rulings of this court, the judgment of the lower court will not be disturbed on questions

of fact unless all the evidence which was before the lower court is brought before this court.

The judgment will therefore be affirmed.

RUDKIN, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

[No. 7553. Decided May 1, 1909.]

L. P. COONROD *et al.*, *Appellants*, v. I. J. STUDEBAKER *et al.*,
Respondents.¹

HUSBAND AND WIFE—CONVEYANCES—SEPARATE PROPERTY OF WIFE. A trade of separate property of two wives, arranged by their husbands, is ratified by the wives by their joining in deeds of the property.

VENDOR AND PURCHASER—PERFORMANCE—DEFECTS IN TITLE—SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY. Where, upon a trade of property, each party agreed to furnish an abstract showing a good and sufficient title within thirty days, specific performance will not be decreed in favor of a plaintiff whose abstract of title was defective, where it appears from plaintiff's testimony that he acknowledged the defect, after one attempt to correct it, and that defendant, having waited for a reasonable length of time after the thirty days, then indicated that he would not be further bound by the contract.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered August 21, 1908, granting a nonsuit at the close of plaintiffs' case, dismissing an action for specific performance. Affirmed.

Geo. W. Shaefer, for appellants.

W. B. Ridle and Elihu E. Adams, for respondents.

DUNBAR, J.—This is an action to enforce the specific performance of a contract for the sale and exchange of real property. It is unnecessary to set forth the contract, but, in short, the plaintiff L. P. Coonrod agreed, for a certain

¹Reported in 101 Pac. 489.

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consideration, to sell certain city property in Kansas City, Missouri, to the defendant I. J. Studebaker, who, in turn, agreed to sell to the plaintiff certain property in Adams county, in the state of Washington. Said sale was to be made within thirty days, and it was agreed that within that time each party should furnish an abstract of title to the property to be conveyed by him, brought down to date of this contract, showing a good and sufficient title. That was the language of the closing sentence of the contract. On the 11th day of November, the plaintiffs executed a warranty deed to the defendants of the land which they had contracted to convey, and at the same time the defendants executed a warranty deed to the plaintiffs conveying the land which they had agreed to convey. These deeds were executed on the 11th day of November, being one day after the time had expired within the contract, but we think the testimony plainly shows that this time was waived by the defendants. After examining the plaintiffs' abstract, the defendants raised objections to the plaintiffs' title as shown by the record. An attempt was made by the plaintiffs to correct the abstract, and a second abstract was obtained, which was also objected to, the abstract not showing title which plaintiffs demanded. About the 9th day of December, the defendant indicated that he would not longer be bound by the contract, and on the 15th day of December refused to convey the land specified in the contract, and this suit was shortly thereafter brought, setting up the violation of the contract and asking for specific performance. The answer denied that the contract had been complied with by the plaintiffs, averred that the defendants had never been furnished with a marketable title, and that they had elected to rescind the contract. At the close of plaintiffs' testimony, a motion was made for nonsuit, which was granted, the court remarking:

"My recollection is that the supreme court ruled upon a very recent case and held simply this: that where the agree-

ment was that the abstract was to be satisfactory and the parties submitted it to an attorney and the attorney rejected it, that you could not compel a specific performance. I think this motion should prevail, Mr. Shaefer. I do not see how the court could perform this contract under the plaintiff's own testimony. The plaintiff himself testified—the very last conversation—the defendant told him he was liable to sell the property to somebody else. Now, that shows the abandonment of the contract, because if he still considered himself held by the contract, he would not talk about selling it to somebody else. I think on the testimony of the plaintiff himself that this motion should be sustained.”

We think the motion should be sustained for the last reason assigned by the court. When the abstract was presented, an opinion was filed by one Riddle, holding that the title was not good. The defendants also obtained an opinion from attorney Adams to the same effect.

Many questions are discussed in this case which it seems to us are not pertinent. Objections are raised by the appellants, that the court erred in not admitting the opinion of an abstract company, in answer to the opinion rendered by Adams. As we shall see further on, though, the opinion of the abstract company sufficiently affirmed the opinion rendered by attorney Adams to warrant the defendants in objecting to the title. The respondents contend that it was shown that the land in question, both that of the plaintiffs and that of the defendants, was the separate property of the two separate spouses, and that, therefore, this action could not be maintained. But a sufficient answer to that objection is that the testimony shows that deeds were executed by the plaintiff L. P. Coonrod and his wife to the defendant I. J. Studebaker, and by the said defendant and his wife to the plaintiff L. P. Coonrod, conveying this land in accordance with the contract which had been made between the husbands, and this was a ratification of the contract entered into by the husbands.

It is also contended by the appellants that some of the ob-

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jections raised by the respondents are not tenable, because the statutes of limitation in the state of Missouri would bar any claim or the bringing of any action for the possession of this land. But it is established beyond necessity of citing authority that, under a contract like this, the party purchasing is entitled to a marketable title. The purchaser cannot be put to the peril of hunting up testimony outside of the record, or of ascertaining whether there are any minor heirs who might not be precluded by the statute, or any testimony of that kind; but has a right to a clear title as shown by the record. The testimony in this case is meager, but it shows that, when the title was objected to, the title company which furnished an opinion for the defendants agreed that, while the most of the objections raised by the respondents were not tenable, there were certain defects shown by the abstract which would have to be corrected before a good record title was shown. The testimony is, that an attempt was made to do this; that the abstract was returned to Kansas City, and that certain corrections were made; that it was not returned until about December 9. At that time there were still objections made by the respondents to the title, and it seems that these objections were also concurred in by the title abstract company, the appellant Coonrod testifying to the meeting between him and the defendant on the 9th:

"A. Yes, there was. We discussed pro and con—the conversation, or rather the objection Mr. Adams had raised and the answers the title company had made to them, and one objection I read that the title company had made the two both agree upon, and I told him that I would send the abstract back and have it corrected. Q. Well, what did he say to that? A. He said that if he still had the property when that came back and the abstract was made satisfactory, and he still had the property, it was a trade."

So that it would seem that there was no further waiver of time by the respondent, and that he did not consider himself bound any longer, but that if, when the abstract was made

satisfactory he saw fit to make the trade, he would do so. The same witness again testified:

"A. He objected to certain phases of the abstract and said it would take too long to get the title perfected, and I told him the only vital objection that I could find was the first page not being certified to. Q. Did you have them certified after? A. I did. Q. Now, did he at the time tell you that he declared and cancelled this contract, declared it null and void? A. No, not at any time."

Again:

"Q. And you say he never told you that the deal was off; that it had taken you too long to straighten your title? A. No, not till December and then he didn't say it was off point blank."

Again:

"Q. And he told you also at that time that if later on, if he still had the property that he might possibly deal with you? A. That was the last conversation we had in his office, early in December. Q. When he said that? A. Yes. Q. And then did you have a conversation thereafter you say in the early part of December? A. Well, that was about the middle of December. Q. The last conversation you had? A. That was the last conversation."

Now, this is substantially the testimony of the appellant in relation to the objection of the title and the time agreed to by the respondent for the correction of the abstract. It seems, under the testimony adduced, that it is not necessary to go into the question of title in all its detail, as it is conceded by the appellant that at every time there was an objection made to the title, the objection in some material particular was admitted. The respondent having waited a reasonable length of time and the abstract still having to be corrected at the time he saw fit to rescind, he was justified in refusing to perform the conditions of the contract, and of course the appellant cannot enforce specific performance

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unless he was able to comply with the conditions of the contract upon which he relied.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7761. Decided May 1, 1909.]

SPOKANE VALLEY LAND & WATER COMPANY, *Appellant*, v.
ARTHUR D. JONES & COMPANY *et al.*, *Respondents*.¹

JUDGMENT—*RES JUDICATA*—MATTERS THAT MIGHT HAVE BEEN LITIGATED. A judgment perpetually enjoining an irrigation company from lowering the waters of a lake, claimed by littoral owners by prior appropriation, is *res judicata* in a subsequent action by the irrigation company to condemn the right to use the waters, and concludes the company from asserting in the condemnation suit that the littoral owners had not appropriated the waters and that the same were open to appropriation by it by virtue of an act of Congress; since such question might have been litigated in the former action.

IRRIGATION—EMINENT DOMAIN—PROCEEDINGS—AMENDMENT LIMITING WATERS SOUGHT—APPEAL—ERRORS RESERVED. In condemnation by an irrigation company of the waters of a lake, affecting the right of littoral owners to water used by them for irrigation purposes, an offer of evidence of a proposed stipulation agreeing to permit the defendants to use sufficient water to irrigate their lands, is in substance an amendment of the petition limiting the water sought to be conveyed, and error, if any, in refusing the evidence is sufficiently reserved by exceptions, without formal offer to amend the petition.

SAME—PETITION—CERTAINTY AS TO WATER RIGHTS CONDEMNED. The rule that property sought to be condemned must be described with reasonable certainty, is sufficiently complied with where, in condemnation of littoral rights and waters in a lake for irrigation purposes, the petitioner exempted such water as was necessary to irrigate the lands of the littoral owners, and showed the number of acres of their irrigable land and that five-thousandths of a cubic foot per second of time per acre was sufficient; since that gave the court a definite basis for a decree, and that is certain which can be made certain.

¹Reported in 101 Pac. 515.

SAME—RIGHT TO CONDEMN WATERS—JOINT USER. Bal. Code, § 4156, providing that the rights of riparian owners to water needed for irrigation cannot be condemned, establishes the policy of this state for a joint user in many instances of waters sought to be condemned for irrigation purposes.

SAME—PETITION—LIMITING WATERS SOUGHT—PAYMENT OF COMPENSATION OTHER THAN MONEY. In condemnation of waters of a lake for irrigation purposes, part of which are already used by littoral owners for irrigating their lands, an offer of the petitioner to exempt sufficient water to irrigate the lands of the littoral owners is not an attempt to pay damages in compensation other than money, in contravention of Const., art. 1, § 16, in view of the statute prohibiting the condemnation of waters needed for irrigation.

Appeal by plaintiff from a judgment of the superior court for Spokane county, Poindexter, J., entered June 22, 1908, adjudging a public use, and awarding damages to defendants, in an action to condemn a way for a ditch and the riparian rights to the waters of a nonnavigable arm of a lake. Reversed.

Allen & Allen, for appellant.

Gallagher & Thayer, for respondents.

GOSE, J.—The appellant, a public carrier of water, was the plaintiff below. Liberty Lake is a body of water limited in area, and is navigable for small craft. The respondents are the owners of section 15, in township 25, north, range 45 E., W. M. An unnavigable arm of said lake, sometimes called "Loomis Lake," dry at its intake in low water, extends for some distance into such land. Some time prior to the commencement of this action, the appellant and its predecessors in interest constructed a dam across the arm of Liberty Lake at a point near the lake, and also constructed a canal and laterals for the purpose of impounding and carrying the water from such lake to semi-arid, nonriparian land and distributing the same to consumers to be used for irrigation purposes. It has since maintained such dam, canal, and laterals and diverted and distributed such water as a public carrier. The main canal is constructed through what was formerly

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the bed of the arm of Liberty Lake, to a point near the west line of such section, from whence it continues in a northwesterly direction, passing off such section at a point on the west line of the northwest quarter thereof. The appellant asserts ownership by appropriation of the water of such lake. This suit was instituted for the purpose of condemning a strip of land seventy-five feet in width, being thirty-seven and one-half feet in width on each side of the center of such canal as the same is located and constructed over and across such section, and to condemn whatever littoral or riparian rights the respondents own, and to determine the compensation to be made to the respondents for the taking of such right of way and the withdrawal of the water from the arm of the lake. The construction of such dam has resulted in the withdrawal of all the water from the bed of the arm of the lake. The respondents' land does not touch Liberty Lake proper. The trial court found that the appellant had a right to condemn such strip of land for canal purposes; that as a public carrier it could condemn respondents' riparian rights; fixed the damage to the respondents at \$24,000; and entered a decree accordingly. The appeal is prosecuted from such decree.

At the threshold of the case the appellant contends that, under the act of March 3, 1877, U. S. Com. Stats. 1901, p. 1549, the water was public and open to appropriation at the time it constructed its canal and diverted the water from the arm of the lake; that the respondents had not then and have not since appropriated any of such water under such act, and that they have no littoral or riparian rights to condemn. This case was before this court on the question of the construction of Bal. Code, § 4156 (P. C. § 5871); *State ex rel. Liberty Lake Irr. Co., v. Superior Court*, 47 Wash. 310, 91 Pac. 968. The appellant is foreclosed from raising this question. Before the commencement of this suit, Jones & Company, who was then the owner of section 15, commenced an action against the appellant in the superior court of Spo-

kane county for the purpose of enjoining it from maintaining its dam and from interfering with the natural state of the water of Liberty Lake. In that suit a final decree was entered against the appellant, from which we excerpt the following:

"It is hereby ordered, adjudged and decreed that said defendant be and it is hereby perpetually enjoined from maintaining, using or operating the dam and head gates heretofore erected in Liberty Lake, . . . or any other obstruction to the natural flow of the waters in said lake, and from preventing the waters of Liberty Lake from reaching the plaintiff's premises, . . . as they were wont to do in their natural condition when not obstructed or interfered with, and said defendant is further enjoined from interfering with or affecting in any way whatsoever the natural level of the waters of said lake and from using or drawing off the waters thereof for any purpose. And it is ordered to forthwith remove the aforesaid dam and head gates."

The decree then provided that its enforcement should be held in abeyance, provided the appellant should prosecute condemnation proceedings with due diligence and pay such judgment as should be entered therein within thirty days after the judgment, unless an appeal therefrom should be taken. The appellant prosecuted an appeal from such judgment, and its appeal was dismissed in this court. *Jones & Co. v. Spokane Valley Land & Water Co.*, 44 Wash. 146, 87 Pac. 65. Such injunction is therefore now in force. In *Spokane Valley Land & Water Co. v. Madson*, 46 Wash. 640, 91 Pac. 1, this appellant sought to raise this question. At page 641, the court said:

"Appellant sustains its contention by an elaborate and able argument which would appeal with much force to the writer of this opinion were the question properly before the court at this time. But, in view of the former adjudication between these same parties relative to the same subject-matter, we are constrained to hold that this question is not now before us. It could have been (but was not) presented when the case was here before. The decision announced at that

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time must, for the purposes of the present hearing, be deemed binding as between the parties."

See, also, 24 Am. & Eng. Ency. Law (2d ed.), pp. 713-14.

It is fundamental that it was the duty of the appellant, in the suit wherein the injunctive decree was entered, to assert and establish all the rights which it had or claimed to have in the subject-matter of the action. Failing to do so, it cannot now be heard in a separate suit to claim any rights inconsistent with such judgment.

The respondents earnestly urge that there are no other errors sufficiently assigned. As to the questions hereafter considered, we think this contention is without substantial merit. During the trial of the case the court admitted in evidence an offer or stipulation of the appellant in the following language:

"The plaintiff hereby stipulates and agrees that there shall be excepted from these proceedings and from the order of appropriation to be entered herein so much of the water of Liberty Lake as shall be necessary to irrigate the defendant's land, to wit: Section fifteen (15), township twenty-five (25) north, range forty-five (45) E. W. M., said water to be taken from the canal of plaintiff in said section 15 at such place or places as the defendants may select and in such amounts and at such times as the same may be needed for irrigating said land and that the court shall in the order of appropriation herein determine and fix the amount of water needed for such irrigation and fix the time or times of use thereof, and that the right-of-way sought to be condemned herein shall be subject to the right of the defendants to enter upon said right-of-way for the purposes of putting in and installing and maintaining the necessary pumping plant or other apparatus necessary to obtain said water from said plaintiff's canal for such irrigation. This agreement and stipulation and the rights so to be excepted and reserved to defendants to run with the land and to pass with the land to the grantees of the defendants of said section fifteen."

The respondents urge (1) that no error is assigned on this stipulation. This we have seen is without merit. (2) That the offer is in the nature of an abandonment of a part of the

water, and that there can be no abandonment without a surrender of possession. This objection will be considered in connection with the respondents' objection No. 4. (3) The offer is unavailing, except by an amendment of the petition. (4) The offer is an effort to reduce the damages by tendering to respondents something in lieu of money, in contravention of art. 1, § 16, of the constitution. (5) That the description of the property sought to be reserved to the respondents is vague and indefinite. (6) That the effect of the offer, if carried into the decree, would be to create a joint control of the water which public policy forbids. In considering these questions we will first treat objections 3, 5, and 6, in their proper order.

(3) We have observed that the offer was admitted in evidence. We think that it was in substance and effect an amendment of the petition whereby the appellant limited the water it sought to condemn to the quantity in the lake in excess of the needs of the respondents for irrigating their land in section 15. Their rights for domestic uses were protected in another offer to which the respondents had given their assent. This view is supported by the case of *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807. In the *Dunlap* case a judgment creditor of an insolvent corporation, after the issuance of an execution and a return of *nulla bona*, brought suit against the stockholders to recover a judgment for their unpaid subscription. Pending the action a receiver was appointed for the insolvent corporation, which fact was shown by a supplemental answer. At the conclusion of the testimony and after the jury impaneled to try the case had failed to agree, and after the parties had submitted the case to the court for its decision on questions of both fact and law, the plaintiff filed a written offer whereby she consented that the receiver should be substituted as plaintiff, or that she would assign to the receiver any judgment that should be entered in her favor, or that the court should provide that any judgment that should be entered in her favor should be for the

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benefit of all the creditors of the corporation, and that any money collected on the judgment should be distributed *pro rata* to all the creditors. At page 625 the court said:

"We deem it of no consequence that the court did not direct amendments of the pleadings or a formal substitution of the receiver."

But the result will not be changed whether it be treated as an amendment, as an offer to amend, or as evidence. Under our liberal rule of pleadings, a party is ordinarily entitled to amend a pleading at any time before judgment. The action of the court during the trial and its finding that the respondents refused to accept the offer, conclusively show that the court was controlled by the view that the acceptance of the offer was optional with the respondents. The appellant reserved exceptions, and clearly stated its view, in objections which it interposed during the trial of the case. The error, if any, is therefore sufficiently reserved. *LaRault v. Palmer*, 51 Wash. 664, 99 Pac. 1036.

(5) The true rule is that the property sought to be condemned must be described with reasonable certainty. "That is certain which can be made certain by means of the description or references contained in the petition." 2 Lewis, Eminent Domain (2d ed.), par. 350.

See, also, *State ex rel. Liberty Lake Irr. Co. v. Superior Court*, 47 Wash. 310, 91 Pac. 968.

In this case, at page 315, the court, speaking to the instant case, say:

"The order of appropriation shall except from its operation a sufficient amount of water to meet the present needs of relators and the needs that will accrue within a reasonable period of the immediate future; so far as the court can determine by the preparations made, and from all the facts and circumstances shown, and the expressed intentions and purposes of relators, and the evident good faith relative to promptly placing said lands under irrigation."

Indeed, Bal. Code, § 4156 (P. C. § 5871), provides for contingencies of this character in that the riparian rights of

a party cannot be condemned as to water "that is needed" by him for irrigation. The language quoted from the *Liberty Lake* case was spoken in relation to the construction of this statute. The appellant offered evidence tending to show that five-thousandths of a cubic foot of water per second of time per acre was sufficient to irrigate respondents' land. The evidence showed the number of acres of land that was irrigable. This gave the court a definite basis for a finding and a decree.

(6) The respondents cite *Dillon v. Kansas City etc. R. Co.*, 67 Kan. 687, 74 Pac. 251, in support of this objection. In that case the court say:

"It is highly important to the general traveling public, as well as to business interests that such corporation have exclusive possession and uninterrupted control of all property, the use of which is necessary in the discharge of this service."

The courts have not been troubled in deciding such questions in water cases. *Nesalhou v. Walker*, 45 Wash. 621, 88 Pac. 1032. As we have seen, Bal. Code, § 4156, *supra*, contemplates a joint user in many instances where riparian rights are sought to be taken by condemnation. The statute establishes the public policy of this state touching such questions.

(2) (4) We next come to the principal question, whether the effect of this offer is to give the respondents some right or easement as compensation rather than money, in contravention of art. 1, § 16, of the constitution. Is it not rather an effort on the part of the appellant to appropriate a part of the water of Liberty Lake, reserving to the respondents so much thereof as shall be found necessary for the irrigation of their land, such quantity to be made definite by the court after hearing the evidence? In some of the cases cited by the respondents to sustain this contention, the party desiring to condemn sought to reduce the damages to the landowner by a tender of a right or easement in something apart from the property sought to be condemned. The appellant, in making

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this offer, brought itself within the principle announced in *Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Ter. 38, 13 Pac. 186; *Tyler v. Hudson*, 147 Mass. 609, 18 N. E. 582, and *St. Louis etc. R. Co. v. Clark*, 121 Mo. 169, 195, 25 S. W. 192, 906, 26 L. R. A. 751. In the *Owsley* case, at page 46, it is said:

"In course of the trial it appeared in evidence for plaintiff that certain irrigating ditches, crossing the right of way, were interfered with and obstructed by the construction of the railroad. There was also evidence tending to show that at the time of commencement of the appropriation proceeding the construction was not complete. Thereupon the defendant offered to prove by testimony of its constructive engineer that according to the plans for construction the irrigating ditches were to be placed by the company in the same condition as before construction, and were to be maintained in that condition afterwards by the defendant at its own expense. Defendant also offered to show by the same witness what would be the expense of replacing the ditches interfered with, and of putting them again in the same condition as they were before the beginning of the construction, and that he was instructed by defendant during and as part of the construction to replace the ditches at defendant's cost, and put them in the same condition as found. All these offers were overruled by the trial judge, and exceptions to his rulings were duly taken and allowed."

And continuing, at page 49, the court say:

"We see no reason why any corporation seeking appropriation of a right of way should not be held entitled to the benefit of all the ingenuity and economy it may have at command in the planning and construction of its works, not only with reference to outlay for material and labor, but also with reference to compensatory damages to property owners along its right of way. If it sees fit to leave unappropriated so much of the landowner's interest as consists in an easement for irrigating ditches across the right of way, there is no rule of law of which we are aware to prevent it doing so. It surely cannot be sound law that the corporation must take everything or nothing. Rather, it is bound to use its right of appropriation so as not to destroy or interfere with or

debar any rights which may reasonably stand without prejudice to its own legitimate operations."

At page 51 the court, continuing, said:

"If, according to the plan of construction of the defendant's railroad—actual, and not mere paper plan,—plaintiff was to have or did have water passage from one side of the road to the other for purposes of irrigation, then he had a substantial right to such passage and could enforce it against the railroad company. It follows that no just estimate of his damages could be arrived at without taking that right into account as a substantial and permanent right qualifying the amount he ought to recover."

In *Tyler v. Hudson*, *supra*, at page 611, certain property was sought to be condemned subject to the following reservation:

"In this taking, the reservation is expressly made to the eight land-holders above named, their heirs and assigns, for their cattle to come to said Gates pond to drink, and to said owners, their heirs and assigns, to come to said pond to cut ice for domestic purposes, and to otherwise enjoy the use of said pond."

Speaking to the effect of this reservation, at pages 612, 613, it is said:

"The right to take the land by purchase or otherwise does not involve the obligation to take the whole interest in land purchased or otherwise taken. That a right of way could be reserved in land taken by purchase will not be questioned; the objection to reserving a right in the owner in land taken *in invitum* is technical rather than substantial. It is true that, in a sense, it may be said to create a new estate in him without his assent. A technical answer might be, that, the estate being for his benefit, his consent and acceptance simultaneous with the taking will be presumed. The real answer is that the refinements and nomenclature of conveyancing will not be applied to a taking by right of eminent domain. No more land and no greater interest in it need be taken than the public use requires. If the right to make a particular use of the land is of benefit to the owner, and puts no new burden upon him, and does not interfere with the public use for which

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the land is taken, there is no reason that he should be deprived of that use, and be paid its value as damages; all the right to use the land except that right may be taken, and that be left in him to enjoy or not as he pleases. If the right is of value, a valuable right in the land will remain in him, though he may refuse to exercise it. We are of the opinion that the whole estate in the land was not taken, but that a right in it appurtenant to the whole land of which it was parcel was left in the owners. Whether that right diminished the damage to the adjoining land should have been left to the jury. The raising of the water of the pond by Brigham did not destroy its identity as a great pond; the public still retained their rights in it. These rights in the littoral owners, and their right of access to the pond over the land taken, were recognized and preserved in the taking."

In *St. Louis etc. R. Co. v. Clark, supra*, at page 189, the property was sought to be condemned subject to the following reservation:

"That said company will construct and maintain for the use of said defendant Clark, his heirs and assigns, across the tracks of its railroad within the land of said defendant Clark, two crossings, which shall be located at such places as said defendant shall select."

At page 190, the court said:

"The question is then presented whether the company in condemning a right of way may reserve to the landowner, without his consent, one or more open crossings and have the damages assessed on the basis that the landowner has and retains such an easement."

And, continuing, at page 194, the court say:

"The company had the undoubted right to elect, as it did, to take a strip fifty, instead of one hundred, feet in width, and if it sees fit to reserve two open crossings for the defendant's use, we can see no reason why the reservation may not be made, and the damages then assessed on the basis that the defendant retains that interest in the land. The statute very justly and properly places restrictions upon the exercise of the right of eminent domain, but it does not follow by

any correct reasoning that the condemning company is bound in all cases to go to the full extent of the law. We are aware there are cases which seem to hold that to allow the company to reserve a right to the owner of the land, when he does not ask it, is to pay him for the land taken in something other than money; but it must be evident that such reasoning is not sound. The reservation of the easement being made, the damages are assessed in view of the interest thus retained and not condemned. The company pays for what it needs and takes, and the landowner is allowed all the damages which he in fact sustains."

See, also, *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663; 15 Cyc. 717, 718.

We are in full accord with the views expressed by these courts. The difference in condition between the reservations in these cases and the instant case is more fanciful than substantial. It is one of degree only. It is fundamental that the condemning party cannot take more than his reasonable necessities require. He can condemn less if he chooses to do so. In legal effect, the appellant is seeking to acquire a part of the riparian rights of the respondents and they are insisting that it shall be required to take all of such rights, whilst, on the former appeal, they contended that it could not take any part of such water. We have seen that the effect of the dam is to take all the water out of the bed of the arm of the lake and place it in the canal which follows the bed of the lake to a point near the west line of the respondents' land. In this way the loss of the water by seepage is materially reduced, and the water economized for a beneficial public purpose. As pointed out in the Missouri case, there are cases which hold that this results in paying the landowner something other than money, but we agree with that court that such view is not sound. The court should first determine and fix the quantity of water reasonably necessary for the irrigation of the respondents' land in section 15, in the manner and form stated in the stipulation, not for two or three years, but as a perpetual right, to run with the respondents'

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land as stated in the offer. The quantity of water being fixed, the damages should then be assessed in view of the interests thus retained and not condemned. In this way the appellant will pay for what it takes, and the landowner will be allowed all the damages which he in fact sustains.

We have not overlooked the orders heretofore made by the several trial judges since the case was here on the former appeal. We do not think that such orders militate against the view herein announced. Other minor questions have been pressed in the briefs of the respective parties which we do not regard as material in view of the conclusion we have reached.

The case will be reversed, with directions to the trial court to permit the appellant to amend its petition so as to incorporate its offer, if it so desires. Otherwise it will be treated as amended in that respect. In view of the fact that the court may have been misled by some of the contentions and remarks of the appellant's counsel, costs on appeal will not be allowed to either party.

FULLERTON, CHADWICK, DUNBAR, and MOUNT, JJ., concur.

[No. 7833. Decided May 3, 1909.]

BONNIE GERTRUDE LOWE, *Plaintiff and Appellant*, v.
VALENTINE VICTOR LOWE, *Defendant and Appellant*,
THOMAS R. WATERS, *Guardian Ad Litem*,
Respondent.¹

APPEAL—NECESSARY PARTIES—NOTICE. A trustee appointed to hold the title to property for the benefit of children, who did not appear in the action, is not a necessary party to an appeal upon whom notice of appeal is to be served.

APPEAL—DECISIONS APPEALABLE—FINAL ORDERS. An order directing the execution of a deed pursuant to a decree of divorce distributing property, is appealable as a final order affecting a substantial right.

DIVORCE—DECREE—PROVISION FOR CHILDREN—REMARriage—PARENT AND CHILD. Where a decree of divorce set aside certain property for the benefit of children upon the prayer of the complaint asking that it be deeded in trust for them, the court lost jurisdiction to compel such conveyance where the parties remarried before conveyance and jointly petitioned for modification of the decree; the court having no jurisdiction to take control of the children in such case.

Appeal from an order of the superior court for Whatcom county, Kellogg, J., entered August 22, 1908, requiring the execution of a trust deed for the benefit of minor children, upon granting a divorce, after a trial on the merits before the court without a jury. Reversed.

T. D. J. Healy and Noethe & Thompson, for appellants, cited: 17 Am. & Eng. Ency. Law (2d ed.), p. 1060; *Neary v. Godfrey*, 102 Cal. 338, 36 Pac. 655; *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779; *Swiney v. Swiney*, 107 Mich. 459, 65 N. W. 287; *Schammel v. Schammel*, 105 Cal. 258, 38 Pac. 729; *Chaffee v. Chaffee*, 15 Mich. 184; *Alexander v. Alexander*, 140 Ind. 560, 40 N. E. 55; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Cottrell v. Thompson*, 15 N. J. L. 344.

Waters & Downer (Black, Kindall & Kenyon and Fred W. Neal, of counsel), for respondent.

¹Reported in 101 Pac. 704.

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DUNBAR, J.—In April, 1907, Bonnie Gertrude Lowe, as plaintiff, instituted an action for divorce against Valentine Victor Lowe, defendant, in the superior court of Whatcom county, which action terminated in a judgment in favor of the plaintiff and against the defendant, dissolving the bonds of matrimony then existing between them. The decree also provided for the disposition of the real property of the parties, amounting to \$19,000, \$6,000 being settled upon the plaintiff and a like amount upon the defendant. As to the remaining realty, valued at \$7,000, it was provided in the decree that the same "is hereby set apart and proper deed of conveyance is hereby ordered in the premises to Scott A. Post, as trustee for the use and benefit of the minor children of plaintiff and defendant, and for their support and maintenance and education, said trustee being at all times subject to the orders and control of the superior court above named in all things and matters pertaining to said trust, and subject to the supervision of the court." The disposition of the \$7,000 worth of realty was probably based upon allegations in the complaint, to the effect that it was the desire of the parties that the property be awarded for the use and benefit of the children, for their support, maintenance, and education, subject to conditions to be imposed by the court, the plaintiff alleging that the property should be awarded to her that she might properly provide for the children. The property was tendered into court under a stipulation of the parties to the action, for the support, maintenance, and education of the children. The court found that the said property should be set apart to a trustee to be agreed upon between plaintiff and defendant, and thereafter the decree was entered on the 22d day of June, 1907.

Nothing further was done by the parties to the action to divest themselves of the title to the realty, and thereafter, on September 15, 1907, both plaintiff and defendant, with their respective counsel, appeared before the court, who had verbally instructed counsel to present the respective parties they

represented, for the purpose of executing the trust deed referred to, at which time the court was informed that the parties had agreed to remarry, and would do so within a few days. Whereupon the court informed them that he would allow five days within which to execute said instrument as the same had been prepared, or, in the alternative, to make a proper showing for their failure so to do. Within the time granted the parties remarried, and jointly petitioned the court for a modification of the decree by striking therefrom that part of it incorporating the trust features; which the court denied. On the 30th of July, 1908, the respondent, Thomas R. Waters, who had been appointed guardian *ad litem* of the children for the purpose of examining into the matter of their petition to modify the divorce decree, moved the court for an order requiring appellants to show cause why they should not execute a proper deed of conveyance of the real estate in controversy to S. A. Post, as trustee. The appellants, upon the advice of counsel, elected to treat the provisions of the decree requiring them to execute such trust deed as ultra judicial and void, and objected to the jurisdiction of the court, setting forth by affidavits the condition of the parties to the action and the children in relation to the property. The court, however, ordered them to execute a deed of trust within five days, and in event of their refusal so to do Ed. L. Collier was appointed a commissioner for the purpose of executing the same. From said order, this appeal is prosecuted.

A motion to dismiss the appeal is made on the ground (1) that this court has no jurisdiction in this matter for the reason that there is a defect of parties respondent, and (2) that the supreme court has no jurisdiction in this matter for the reason that there is no statute or law of this state allowing appeals to the supreme court from such orders of the superior courts as the one appealed from herein. It does not appear that Post, who was not made a party to the action upon which this motion is based, ever appeared in the case,

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and not having so appeared, he was not a necessary party to the appeal. *Essency v. Essency*, 10 Wash. 375, 38 Pac. 1130; *Seattle & M. R. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567; *Collins v. Kinnear*, 37 Wash. 453, 79 Pac. 995; *Eldridge v. Stenger*, 19 Wash. 697, 54 Pac. 541; *Curran v. Seattle & S. F. R. & Nav. Co.*, 34 Wash. 512, 76 Pac. 87. The other ground of the motion is equally without merit, for it must appear certainly that this was a final order affecting a substantial right.

As to the merits, it would seem that the simple statement of the case would unquestionably call for a reversal of the judgment. We are not inclined to enter into a discussion of the questions argued in the brief at great length, as to whether the court had original jurisdiction in a divorce case to create a trust, for the reason that, if it did have such original jurisdiction, that jurisdiction was lost when the parties to the original action remarried. The domestic status of the parties was restored or reinstated by the marriage. Their relations to their children and the property which had been set aside for the children then became exactly as they were before the divorce. The father and mother are now legally husband and wife. They are the natural and legal guardians of the children and custodians of all their property. There is no jurisdiction vested in a court to take the care, custody, or control, education or maintenance of children away from parents, unless a proceeding is instituted for that purpose and it is shown that the parents are not proper persons to have the custody or control of the children. There is no such showing in this case.

The judgment will be reversed, and the court instructed to grant the petition of the appellants.

RUDKIN, C. J., FULLERTON, GOSE, CHADWICK, MOUNT, and CROW, JJ., concur.

[No. 7747. Decided May 3, 1909.]

**BESSIE BARTLETT BEVAN, *Respondent*, v. B. L. MUIR *et al.*,
Appellants.¹**

JUDGMENTS—PERSONS CONCLUDED—NOTICE TO DEFEND—SUFFICIENCY—COVENANTS. A written notice to defend an action is sufficient, where vendors had warranted the title to personal property, the vendee gave notice that an administrator of the estate of H., deceased, had filed his petition in said estate claiming title to the property and claiming that vendors' title rested upon a fraudulent conveyance by the supposed widow of said deceased, that the vendee had been ordered to appear at a certain time to show cause before the Hon. R. B. Albertson why a receiver should not be appointed, and the notice required the vendors to appear and defend said action (Rudkin, C. J., dissenting).

COVENANTS—WARRANTY—SALES—PROPERTY CONVEYED—RULES OF CONSTRUCTION. A bill of sale of "all our interest" in certain personal property, specifying that the sale is subject to certain described liens which the vendee assumed to pay, and concluding with a general covenant "to warrant and defend the sale of said property," warrants the vendor's title to the property and is not a mere quitclaim of the vendor's interests; since, while covenants affect only the interest conveyed, such interest is to be determined by the intent of the parties, construing all the terms of the contract together, and most strongly against the vendor.

COVENANTS—WARRANTY—BREACH—DAMAGES RECOVERABLE—PAYMENTS ON ASSUMED DEBT—SALES—INTERESTS WARRANTED. Upon breach of a warranty of vendor's interest in property which he had held under a conditional sale, sold subject to the original owner's lien for unpaid purchase money, which the vendee assumed and agreed to pay, the vendee cannot recover a sum paid in partial discharge of such lien, on the theory that it was part of the purchase price.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 20, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages for breach of warranty. Modified.

Will H. Thompson, C. A. Riddle, and Trumbull & Trumbull, for appellants, contended, among other things, that the

¹Reported in 101 Pac. 485.

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notice was insufficient; it must be unequivocal, certain and explicit. 8 Am. & Eng. Ency. Law (2d ed.), p. 204; *Dalton v. Bowker*, 8 Nev. 190; *Paul v. Witman*, 3 Watts & S. (Pa.) 407; *Greenlaw v. Williams*, 2 Lea (Tenn.) 533; *Williams v. Burg*, 9 Lea (Tenn.) 455; Rawle, Covenants for Title (4th ed.), p. 232.

Shank & Smith, for respondent, upon the point that the notice to defend was sufficient, cited: 8 Am. & Eng. Ency. Law (2d ed.), p. 205; 23 Cyc. 1272; *Collins v. Baker*, 6 Mo. App. 588; *Paul v. Witman*, 3 Watts & S. (Pa.) 407; *Clark v. Mumford*, 62 Tex. 531; *Patrick v. Laprelle* (Tex. Civ. App.), 40 S. W. 552; *Greenlaw v. Williams*, 2 Lea (Tenn.) 533.

DUNBAR, J.—This is an action for damages for breach of warranty on a sale of chattels and chattel interest in real estate, evidenced by bill of sale. Frederick & Nelson, Inc., had conditionally sold and delivered certain household goods to one Cook, upon an installment contract, reserving title to itself until the goods should be entirely paid for. One J. M. Hale, by subsequent transfers, acquired the interest of Cook, entered into possession, and subsequently died while so in possession, leaving the goods in the possession of one known as Mrs. H. G. Hale, supposed to be his widow. Afterwards she sold her right, title, and interest in the goods to third parties, and thereafter, through a number of transfers, the equity of the original vendee was vested in the appellants in this case. Afterwards appellants sold to the respondent all their interest in the goods, and delivered to her the possession thereof, they being in the possession of the property at the time it was sold. Afterwards the estate of J. M. Hale, through one H. C. Gill, administrator thereof, brought an action against respondent, in which it was claimed that said goods were the property of the estate of J. M. Hale, deceased, and in that action the administrator recovered the goods, and the same were lost to respondent. While that

action was pending and before trial, the respondent gave notice to the appellants of the pendency of said action, requiring the appellants to appear and defend the same, which notice was in writing. The appellants did not appear and defend said action, and it is claimed by the respondent, and found by the trial court, that said notice was sufficient to bind the appellants by that judgment.

The court, trying the case without a jury, made findings of fact, the first and second of which are substantially as stated above, and set forth in the findings the bill of sale, which was as follows:

"Know All Men by These Presents: That B. L. Muir and Clyde W. Coit and Charles A. Cushing, and Helen E. Cushing, the parties of the first part, for and in consideration for the sum of one dollar gold coin of the United States of America, to them in hand paid by Mrs. Bessie Bartlett Bevan, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part her executors, administrators and assigns all our interest in the furniture, household goods and fixtures in or used in connection with that certain sixty-room family hotel known as the 'Burlington,' located on Madison street, in the city of Seattle, King county, Washington, and being number 612 Madison street. Said property is taken subject to a lien of six thousand six hundred and twenty-seven dollars and eleven cents (\$6,627.11) with interest from December 24th, 1906, in favor of Frederick and Nelson Inc. And an indebtedness of one thousand dollars (\$1,000) to Mrs. H. G. Hale, which the purchasers assume and agree to pay.

"To have and to hold the same to the said party of the second part, her executors, administrators and assigns, forever. And they do for their heirs, executors and administrators, covenant and agree to and with the said party of the second part, executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part her executors, administrators, and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same." (Duly signed and acknowledged.)

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The bill of sale of the lease followed. The court found, that the purchase price of the property was \$10,500, of which \$2,872.89 was cash paid by the plaintiff to the defendants on said January 7, 1907; that \$6,627.11 was the balance of the purchase price of the furniture and furnishings owing to Frederick & Nelson, Inc., and the remaining \$1,000 was a note given by a prior owner to the payee named as Mrs. H. G. Hale, being the two obligations specified in the bill of sale, and the payment of which the plaintiff therein assumed as a part of the purchase price; that thereafter, and prior to May 1, 1907, the plaintiff made payments on said indebtedness to Frederick & Nelson, Inc., in accordance with her said contract of assumption, aggregating \$500, making a total of sums paid by her on the purchase price of \$3,272.89, as aforesaid; that the legal title to the furniture and furnishings was on said January 7, 1907, and for some time thereafter, in Frederick & Nelson, Inc.; that on June 4, 1907, one H. C. Gill, the duly appointed, qualified, and acting administrator of the estate of J. M. Hale, deceased, brought suit as set forth in the statement above; that under the institution of said suit on June 4, 1907, the said administrator obtained an order upon the plaintiff to show cause upon June 7, 1907, why the said furniture, furnishings, and leasehold should not be forthwith turned over to the said administrator or else a receiver be appointed; that summons and complaint and the said order to show cause in said action were served upon said plaintiff on June 5, 1907, and that thereupon, on June 6, 1907, the following notice to defend was personally served upon each of the three defendants herein, that is to say:

“NOTICE TO DEFEND.

“To Clyde W. Coit, Charles A. Cushing, Helen E. Cushing, and B. L. Muir:

“You and each of you are hereby notified that H. C. Gill, as administrator of the estate of J. M. Hale, deceased, has filed his petition in said estate and obtained an order upon Mrs. Bessie Bartlett Bevan, otherwise known as Mrs. S. E. Bevan, in said petition claiming that the title to the property

which you sold to Mrs. Bessie Bartlett Bevan under a contract of warranty on the 7th day of January, 1907, which property is known as the furniture, household goods and fixtures in or used in connection with that certain sixty-room family hotel known as the Burlington, located on Madison street, in the city of Seattle, King county, Washington, and being numbered 612 Madison street, is the property of the estate of J. M. Hale, deceased, and that the title to said property has never passed out of said estate, and that the transfer of said property from some one representing herself as the widow of said J. M. Hale, deceased, is fraudulent, and that said person was not the widow of said J. M. Hale, deceased. The court has ordered Mrs. Bevan to appear before the Honorable R. B. Albertson tomorrow morning, June 7th, 1907, at 9:30 o'clock in the forenoon, to show cause, if any, why the administrator of said estate should not be let into possession of said property, or otherwise why a receiver should not be appointed to take charge of said hotel and property. Now then, you are further notified that it is your duty to defend said action, and that the said Mrs. Bevan hereby demands that you do appear in said action and defend the same under your contract of warranty. Hereof take due notice.

"R. S. Jones, Attorney for Bessie Bartlett Bevan;"

that all of the defendants failed to defend the said action, and that plaintiff defended the said action,—in short, was dispossessed of the property, and that by reason of said action the whole thereof was lost to plaintiff.

The conclusions of law were to the effect, that the property was sold by warranty of title except only as against the said two claims mentioned above; that the defendants were duly notified to defend the suit brought by the administrator of the estate of J. M. Hale; that they failed to do so, and that the plaintiff has been damaged by, and is entitled to judgment against, each of the defendants on their warranties of title, in the sum of \$3,372.89, with interest on \$2,872.89 thereof from January 7, 1907, and on the remaining \$500 thereof from May 1, 1907. The appellants excepted to said findings of fact and conclusions of law and each of them,

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which exceptions were overruled, and judgment was entered and appeal taken.

Several assignments of error are made, but it is conceded and stated by the appellants that the whole contest between the parties in this case is not upon any question of fact, but involves two legal propositions; (1) was the notice to defend a sufficient notice to bind the defendants by a judgment in the case wherein the respondent was deprived of any interest she then had in the property then in her possession, the title to which remained in Frederick & Nelson, Inc.; (2) was the sale by the appellants of all their interest in the chattel property equivalent to a sale of the property itself; or, in other words, was the sale of their interest in the property, the title to which was known at the time to be, and found by the court to be in, Frederick & Nelson, Inc., a third party, equivalent to a sale of the property itself, or was it only the passing of the appellants' interest, whatever it might be, to the respondent.

On the first proposition, it is earnestly argued by the appellants that the notice was not sufficient, and many cases are cited to sustain the rule that the notice must be distinct and unequivocal, and must expressly require the party bound by the covenant to appear and defend the adverse suit. Conceding this to be the law, we think, without doubt, the notice was sufficient; for, after all is said and done, the plain, common-sense idea must not be lost sight of, that the object of the notice required is *notice*, and no matter what the form of the notice is or the expressions used, if the party bound by the covenant can understand from it that a suit has been commenced and that he is required to defend, the object of the notice is met. In this case, if a person of ordinary understanding was not able to find the court in which the case mentioned in the notice was pending, it must have been by reason of a want of inclination.

On the second proposition, it is contended by the appellants that a warranty cannot add to or increase the covenants;

that a covenant to transfer all right, title, and interest in property is not added to or increased by a general warranty; that the warranty is co-extensive with, and shall be applied only to, the question of the estate granted by the covenant. It may be conceded that the covenant does not affect anything more than the interest conveyed, but the question is always left as to what was conveyed. In support of the contention of appellants is cited Rawle on Covenants for Title (4th ed.), pp. 525-6-7, and the authorities there cited, and the appellants stated that the author, after quoting numerous authorities, closes in these words:

"So that in a more recent case where the grant was of 'all my right, title and interest in and to that parcel of real estate situated in Green street and is bounded, etc.,' followed by unlimited covenants for the seizin, good right to convey, against incumbrances, and of warranty, it was held that these covenants were limited merely to the right and title of the grantor, whatever they might be, and the law has been so held in many similar cases."

It is significant, however, that the author in the very next section continues as follows:

"It may, however, be observed of these cases, that inasmuch as all conveyances taking effect under the Statute of Uses transfer no more than the estate of the party, such a course of decision, if too strictly carried out, would in such conveyances restrain all general covenants for title to the acts of the vendor, and thus of course utterly change the nature of such covenants. It is conceived therefore that this class of cases should be limited in their application to those where the intention to convey and receive but a limited estate plainly appears on the face of the deed. And in a case in Massachusetts, where the conveyance was of 'the following described water lots,' and appended to the description by metes and bounds, the words 'meaning and intending by this deed to convey all my right, title and interest in and to lots three and six, and my undivided portion of the aforementioned flats,' it was held that the general covenants for title which the deed contained were not restricted merely to the interest of the grantor. So in a late case in Vermont, where

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the grant was of 'the following described land in Colchester, all the land which I own by virtue of a deed, being all my right and title to the land comprising fifty acres of the east of lot 75 in said town,' it was held that the covenants were not qualified by the grantor's interest."

Other cases are cited by the author to the same purport. So that it will be seen that the author, when he is fairly understood, does not lay down the hard and fast rule contended for by the appellants. The next case cited by the appellants, viz., *McNear v. McComber*, 18 Iowa 12, lays down the unqualified rule contended for by appellants, and cites the same section of Rawle on Covenants cited by the appellants to sustain the decision. This case, we think, is not well considered, and was decided through a misapprehension of what was held by the authorities therein cited. To the same substantial effect are the other cases cited, excepting that it appears in most of them that the question of what was conveyed is to be determined from the whole instrument, instead of from any particular portion of the instrument. Thus, in *Sweet v. Brown*, 12 Met. 175, 45 Am. Dec. 248, after deciding that in that case the covenants would not control the grant, the court said:

"The covenants are in terms general; but in the construction of a deed, we are to look at the whole deed, and the covenants are to be construed so as to give effect to the intention of the parties, so far as can be done consistently with the rules of law."

This must necessarily be the case, and is the rule in the construction of all instruments and contracts. The desire and aim of the court must be, if justice is to be done to litigants, to ascertain the intention of the parties to the contract; and it is a rule as broad as the law itself that all the different dependent portions of a contract must be construed together to ascertain such intention.

"If the language used is susceptible of more than one construction, that one must be adopted which militates most strongly against the interests of the grantor."

This was said by this court in *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756, citing Devlin on Deeds, § 848. In that case we cited with approval *Jackson v. Myers*, 3 Johns. 388, 3 Am. Dec. 504, where it was said by Chancellor Kent:

"The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect."

Applying this rule to the case at bar, it seems conclusive that the appellants intended to give the respondent in this case something more than a mere quitclaim to this personal property; and the covenants, while it may be conceded that they cannot control the premises, may appropriately be considered by the court when a question arises as to what is granted, for the purpose of aiding the construction to be given to the instrument. 13 Cyc. 620. The language of this instrument, "Do by these presents grant, bargain, sell and convey unto the said party of the second part . . . all our interest in the furniture, household goods and fixtures in or used in connection with that certain sixty-room family hotel," etc., if construed by themselves might possibly bear the construction contended for by the appellants; but when the further language appears, "Said property is taken subject to a lien of \$6,627.11 with interest," etc., "and an indebtedness of \$1,000 to Mrs. H. G. Hale, which purchasers assume and agree to pay," it must be concluded that the whole property was sold subject to these two incumbrances, just as property is sold subject to mortgages. Now, the covenant, viz., "agree to and with the said party of the second part, executors, administrators, and assigns, to warrant and defend the sale of the said property," still further sustains this contention, for the said property named in the covenant must necessarily refer to the property mentioned in the contract of sale, viz., the property that is taken subject

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to the liens expressed. Therefore, it is the property that is sold; and the warranty is to defend the title to said property, viz., the property that is sold. If this construction cannot be placed upon this instrument, then all that part of the instrument after the first paragraph is absolutely without meaning; because if it was nothing but a quitclaim to the property that was intended to be conveyed, there would not be any necessity for saying anything about what it was sold subject to. In fact, it would seem that a covenant of warranty has no place in a quitclaim contract. Besides, the words "bargain and sell" have a legal meaning, importing a sale which invests the property in the buyer; and while that might not be absolutely controlling, it is one of the expressions used in the instrument which help to construe it. This announcement is made in 43 Century Digest, 263, to the effect that the words "bargain and sale" have a settled legal meaning, and import a sale which vests the property in the buyer. The same announcement is made in *Barrow v. Window*, 71 Ill. 214, citing *Seckel v. Scott*, 66 Ill. 106, and 2 Blackstone's Commentaries, 447. We think the court did not err in placing the construction upon this instrument which it did.

We are unable, however, to understand any theory upon which the court gave judgment for \$500 which was paid by the respondent to Frederick & Nelson, subsequent to the sale to her by the appellants. In speaking of the criticism of the appellants on this proposition, it is said by the respondent in her reply brief:

"The brief overlooks entirely that the contract of the parties put the subsequent payment of this \$500 by respondent to Frederick & Nelson in the exact position of a payment to the appellants on the purchase price."

But neither the findings of the court nor the contract of sale bears out this contention, for the property was sold subject to this claim of \$6,627.11 owing to Frederick & Nelson, Inc., and the \$1,000 indebtedness of Mrs. H. G. Hale; and if it was sold subject to that, of course the appellants were

released from any obligation to pay those charges against the property, under any circumstances. The respondent was buying a property worth something over \$10,000, and paying therefor to the appellants the amount for which she had asked and obtained judgment, and must have understood from the contract that, if the appellants' claim against the estate was to be paid off, it must be paid off by her. If she can pay to Frederick & Nelson \$500, and charge the same back to these appellants, on this sale contract, she could pay the whole amount of \$6,627.11, together with the \$1,000 indebtedness to Mrs. H. G. Hale, and charge the same back to the appellants, and recover therefor; the result being that she would obtain the whole property for the sum of \$2,872.89. This must have been the theory upon which the court made the following finding:

"That thereafter and prior to May 1, 1907, the plaintiff made payments upon the said indebtedness to Frederick & Nelson, Inc., in accordance with her said contract of assumption, aggregating five hundred dollars, making a total of sums paid by her on the purchase price of \$3,272.89 as aforesaid."

Surely if the findings of the court are correct, and this payment of \$500 was made to Frederick & Nelson in accordance with respondent's contract of assumption, there is no theory upon which that payment could be charged back against the appellants in this case.

The judgment will, therefore, have to be modified to the extent of the \$500, and the appellants will recover their costs in this court.

FULLERTON, GOSE, CHADWICK, MOUNT, and CROW, JJ., concur.

RUDKIN, C. J. (dissenting)—In my opinion the notice to appear and defend was misleading and utterly insufficient in law. I therefore dissent.

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Opinion Per MORRIS, J.

[No. 7444. Decided May 3, 1909.]

WITTLER-CORBIN MACHINERY COMPANY, *Appellant*, v.
FELIX MARTIN *et al.*, *Respondents*.¹

APPEAL—DECISIONS—LAW OF CASE. A decision of the supreme court that a description of an engine in a conditional bill of sale was a sufficient memorandum to give constructive notice to subsequent purchasers and incumbrancers becomes the law of the case on a retrial; and it is error on the retrial to submit the question to the jury.

SALES—CONDITIONAL SALES—SUFFICIENCY OF DESCRIPTION—EVIDENCE—ADMISSIBILITY. In replevin for an engine held under a conditional bill of sale, upon an issue as to whether the bill of sale sufficiently described the engine to give constructive notice, it is error to receive evidence that there were similar engines in the county to which the description would apply; since the description need not be so particular as to exclude all other engines.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered January 16, 1908, upon the verdict of a jury rendered in favor of the defendants, in an action of replevin. Reversed.

Rose & Craven, for appellant.

Hardin & Hurlbut, for respondents.

MORRIS, J.—This case has been presented to this court on appeal before, and may be found in 47 Wash. 123, 91 Pac. 629, to which reference is made for a more complete statement of the facts. Upon the first hearing a nonsuit was granted in the court below, upon the ground that the memorandum of sale was insufficient, in that the description of the property was indefinite and defective, and that the location of the property was not correctly stated. Upon the first appeal this ruling was reversed, this court holding that the description of the engine contained in the memorandum was sufficient to give constructive notice to respondents, and remanded the

¹Reported in 101 Pac. 494.

cause for a new trial. Upon the second trial, the court treated the sufficiency of the description of the property as a question of fact for the jury, permitting the respondents to prove that there were "a great many mills of the same general size around over the country" using engines of many different makes, of about the same size as the engine in question, and that the description of the engine in the memorandum would possibly fit any number of engines then in use in the shingle mills of Whatcom county. This evidence was all objected to by respondents, the objections overruled, and the evidence permitted to go to the jury.

This was error. The sufficiency of the memorandum, the character of the description, the effect of the notice—as to whether constructive or not, were all questions involved in the first appeal; and this court had determined and held as a matter of law that the memorandum was in all respects such as is contemplated by the statute, and that it would give constructive notice to any subsequent purchaser. These rulings established the law of this case, and should have been so held by the court below. The evidence was improper in any event. So far as the description contained in the memorandum of sale was an issue, it was this, Did the description properly describe the engine in suit? It might be that many mills in Whatcom county had engines similar to the one described. Such fact was immaterial, if the engine that was in controversy in this action was properly described. It would be a difficult matter to so minutely and particularly describe a given thing that it would mean the exclusion of all others of the same general class or species. This the law does not require. The court should have held the memorandum to be sufficient, that it was constructive notice to the respondents, and submitted to the jury the identity of the engine described in the memorandum with that in the possession of respondents. If the jury should find that it was the same engine, they should return a verdict for the plaintiff.

For error in the admission of testimony, and instructions

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based thereon, properly and duly excepted to by appellant, the judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., CROW, PARKER, FULLERTON, GOSE, and DUNBAR, JJ., concur.

[No. 7799. Decided May 3, 1909.]

DRAINAGE DISTRICT No. 1, KING COUNTY *et al.*, *Appellants*,
v. BRIDGET COSTELLO *et al.*, *Respondents*.¹

APPEAL—DECISIONS APPEALABLE—CONTEMPT—COSTS. An order adjudging a party in contempt and requiring the payment of certain costs is appealable under Bal. Code, § 5811.

INJUNCTION—TEMPORARY SUSPENSION. A temporary restraining order until the hearing is not continued in force by an order at the hearing to the effect that all orders theretofore made in the case be held in "obeyance" during the pendency of the action, the word used evidently being an error for "abeyance," suspending all previous orders, and not intended in the sense that the orders were to be "obeyed."

Appeal from an order of the superior court for King county, Griffin, J., entered August 14, 1908, adjudging the plaintiffs guilty of contempt of court and imposing the payment of costs, pending an action to enjoin the construction of a drainage ditch. Reversed.

Ballinger, Ronald, Battle & Tennant (C. J. France, of counsel), for appellants.

Vince H. Faben, for respondents.

FULLERTON, J.—Drainage District No. 1, a corporation organized for the purpose of constructing drainage ditches on certain lands in King county, condemned a right of way thirty feet wide for the purpose of constructing a drainage ditch across lands owned by the respondents, Bridget Costello,

¹Reported in 101 Pac. 497.

and John Costello. On April 14, 1905, while the district was excavating a ditch, the respondents brought this action against the district and its board of commissioners, averring that they were not confining themselves in the excavation of the ditch to the thirty-foot way condemned, but were using a way more than one hundred feet in width, and were throwing the debris taken from the ditch elsewhere on the respondents' land, and asked for injunctive relief. Coincident with the filing of the complaint, a temporary restraining order was asked for and obtained, restraining the appellants from further prosecuting the work until the further order of the court; directing them to appear on April 18, 1905, and show cause why a temporary injunction should not be granted pending the trial of the action. The appellants appeared on the day named, and a hearing was had, after which the court granted a temporary injunction enjoining the appellants from digging outside of the thirty-foot strip theretofore condemned, and requiring them to give a bond in the sum of \$2,500 conditioned to pay the respondents all damages they might suffer by reason of the prosecution of the work.

On June 10, thereafter, the respondents served on the appellants an amended complaint, in which the relief sought was damages only, averring that their property had been injured by the acts of the appellants in the sum of \$2,500. Thereafter, on June 23, 1905, without notice to the appellants, the respondents obtained from the court a second restraining order, restraining the appellants from further work on the ditch until the further order of the court, and directing them to appear on June 27, 1905, and show cause why a temporary restraining order should not issue against them pending the trial of the respondents' action. This order was issued on the affidavit of Mrs. Costello, in which she alleged that the appellants were violating the original order by digging the ditch deeper and wider than the first order contemplated. On the hearing had pursuant to this notice, an order was made which the clerk recorded under date of June

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29, 1905, in his minute book in the following language: "All orders heretofore made in this cause held in obedience until the trial of the cause on its merits." In his journal under the same date he recorded it as follows: "All orders heretofore made in this cause held in obedience until the trial of this cause on its merits." And in his appearance docket in these words: "June 29, 1905. Entered transferred to Department 6. Judge John B. Yahey; all orders heretofore made in this cause held in abeyance until the trial of the cause on its merits."

The record does not disclose the subsequent proceedings on the merits of the cause, but it is stated by counsel that the action is still pending; it having been once tried and a verdict returned which was set aside and a new trial granted on motion of the losing party. Nothing further appears of record as transpiring in the cause until July 22, 1908, at which time Mr. and Mrs. Costello filed their affidavits, averring that a restraining order and temporary injunction had been issued "on or about the 23rd day of June, 1905," which was still in full force, restraining the appellants from interfering with the drainage ditch across the respondents' property; and that the appellants in disregard thereof had entered upon the respondents' land and were proceeding to clean out the ditch. An order was made based on these affidavits, citing the appellants to appear and show cause why they should not be punished for contempt. On the hearing the court found that the appellants were guilty of contempt of court "in disobeying restraining order made June 23, 1905, and continued effective June 29, 1905;" but found further that the violation was not willful or flagrant, and ordered that they be purged of the contempt on paying the costs of the proceedings. From the order, this appeal is taken.

The respondents have moved to dismiss the appeal on the ground that nothing but a question of costs is involved; citing cases from this court which hold that the court will not entertain an appeal to determine a question of costs merely.

The motion, however, is not well taken. The appellants were found guilty of contempt of court, and the payment of costs was imposed upon them as a punishment for the offense. There is involved in the proceeding, therefore, not only the question of costs, but the question of the right of the court to punish the appellants. An order adjudging a person to be in contempt of court is made appealable by statute. Bal. Code, § 5811 (P. C. § 1480).

On the merits of the controversy we are clear that the judgment is erroneous and must be reversed. Aside from the question of the power of the court to continue a restraining order in force as a temporary injunction by a mere order entered of record, it is clear that in this instance that no such order was made or intended to be made. To hold an order in abeyance is to hold it in suspension, and when the court directed that all orders theretofore made be held in abeyance until the trial of the cause on its merits, he suspended the operation of the temporary restraining order until that time.

We note the contention of the respondents that the court used the word "obeyance" instead of "abeyance," and meant thereby that the temporary restraining order should be obeyed until the trial of the cause on its merits, but we cannot concur in this contention. Had it been the purpose of the judge to continue the restraining order in force, he would, we think, have used some existing word appropriate to that purpose; he would have found no necessity for coining a new one. The insertion of the word "obeyance" in the minute book and journal is plainly an error of the clerk or some copyist of that officer. It cannot be imputed to the judge.

There was no temporary injunction on which to found the contempt proceedings, and the judgment will be reversed, and the cause remanded with instructions to discharge the appellants, with costs in both courts.

RUDKIN, C. J., CHADWICK, GOSE, CROW, MOUNT, and DUNBAR, JJ., concur.

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Statement of Case.

[No. 7725. Decided May 3, 1909.]

RYDER-GOUGAR COMPANY, *Respondent*, v. ELLIS LEWIS
GARRETSON *et al.*, *Appellants*.¹

INSURANCE—AGENTS—LIABILITY TO REFUND COMMISSIONS. Agents who receive a portion of an insurance commission upon a policy secured by them for other or principal agents, under an agreement or general custom to refund the same in case of cancellation of the policy, are liable to the principal agents for the portions received, after the principal agents have, on orders from the company, cancelled the policy and refunded the whole premium paid by the insured.

INSURANCE—AGENTS—AUTHORITY. An insurance broker is the agent of an insurance company where it appears that it represented the company with the knowledge of the company's local agent, who was employed by the broker and who demanded refunds in the name of the broker.

PLEADING—AMENDMENTS AT TRIAL—SURPRISE. Error cannot be assigned upon a trial amendment to the complaint where no claim of surprise or request for a continuance was made.

CUSTOM AND USAGES—PLEADING—NECESSITY. A general custom need not be pleaded in order to admit evidence thereof in an action upon an obscure contract dependent upon such custom.

ACTIONS—PARTIES PLAINTIFF—CONTRACTS—PARTNERSHIP. A contract of partnership between plaintiff and a third person is inadmissible to show a defect of parties plaintiff, or a necessity for filing the names of the partners under Laws 1907, p. 288, where the contract was dated after the plaintiff's cause of action arose against the defendants.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered June 2, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover commissions retained by an agent after cancellation of an insurance policy. Affirmed.

A. H. Denman and *Ellis Lewis Garretson*, for appellants.
Ellis, Fletcher & Evans, for respondent.

¹Reported in 101 Pac. 498.

PARKER, J.—This cause was tried by the court without a jury, at the conclusion of which it made findings showing the following main facts: The plaintiff is a corporation engaged in the insurance business at Tacoma, and at the time the facts occurred upon which this action is based, represented the "General Accident, Fire and Life Assurance Company." The defendants are partners, and also engaged in the insurance business at Tacoma. In August, 1907, the defendants, through the plaintiff, caused to be issued to Wilkeson Coal & Coke Company an employer's liability insurance policy in said assurance company, under an agreement between plaintiff and defendants that the defendants should receive the customary commission, in this case amounting to \$216, and if the policy should be cancelled by the assurance company, thus rendering necessary the return of the premium to the insured, the defendants should return that portion of the premium retained by them for commission. The defendants caused the policy to be delivered to the insured, collected the entire premium thereon, and paid the same to the plaintiff for the assurance company, less the \$216 commission retained by them as agreed. Having obtained an adverse report upon the risk, the assurance company cancelled the policy and demanded that the plaintiff immediately pay back to the insured the entire premium and take up the policy. Thereupon plaintiff endeavored to have the company reconsider its action and continue said policy in force, but without avail. Plaintiff then demanded of the defendants the \$216 commission retained by them, so the same could be returned to the insured with the portion of the premium in its hands. This the defendants neglected to pay. This all occurred before the premium had been remitted to the assurance company by the plaintiff. Thereupon, plaintiff being required by the assurance company so to do, repaid to the insured the whole of the premium and took up the policy, and again made demand on defendants for the \$216, which has not been paid, and this action is prosecuted to collect the

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same. Trial was had resulting in findings and judgment against the defendants, from which they appeal to this court.

The first and principal contention of defendants is based upon their exceptions taken to the findings of the trial court as not being supported by the evidence. We have reviewed all the evidence with considerable care and find ourselves quite in accord with the trial court's findings of the ultimate facts.

It is contended by defendants that: "What plaintiff did, was to make a purely voluntary payment of an amount which plaintiff assumed was owing by the defendants to their customer," and therefore they urge that no obligation arose in favor of plaintiff as against them to pay back the commission. This argument assumes that this was in no event more than a debt from defendants to the insured, which, if true, might give their argument some force. But it is plain from the findings, and also we think from the evidence, that the assurance company had the right to cancel this policy as of the date of its issuance, if it desired. If so, it had the right to make the cancellation effective by return of the whole premium, and to do so immediately without waiting the convenience of the defendants to return the portion they had retained as commission.

For the purpose of showing the complete agreement between the plaintiff and defendants, undisputed evidence of a general custom requiring the broker to return his commission upon cancellation of the policy he procures from the insured was introduced. And in this connection there was some evidence tending to show that it was also customary for the premium to be returned to the insured through the broker who procured the insurance, by the company or the agent above him returning the premium to him, and then he returning it to the insured with the commission he had retained. This, it is claimed, plaintiff violated, and thereby waived its claim for the return of the commission. Even if this can be regarded as part of the custom, it was not the part which legally effected the obligation on the part of the defendants to repay

the commission. It seems too plain for argument that the policy could only be effectually cancelled by return of the entire premium to the insured, and, until this was done, there was no obligation created as against the defendants. It was the cancellation of the policy which legally created this obligation. It was not a debt due from the defendants to the insured, but to the plaintiff which represented the assurance company, it having actually paid back to the insured the \$216 commission, in addition to the portion of the premium it had received. It stands in the shoes of the assurance company so far as its rights against defendants are concerned. Defendants are not urging that the company should here be plaintiff. Even if the return premium had taken the course defendants claim the custom required, they would have been paying it back for the plaintiff to effect the cancellation of the policy. The authorities cited by defendants' counsel relate to the voluntary payment of the debt of another where the one paying it was under no obligation to do so, and where he had no legal rights depending upon the payment of it, and hence, are not applicable here.

It is contended that the evidence clearly shows the plaintiff was not the agent of the assurance company, but that one Hussey is the regular local agent, and that this insurance was attempted to be consummated through his agency. There is some evidence tending to show this state of affairs, but there is also evidence showing that Hussey was then, by some sort of employment arrangement the nature of which is not plain, connected with the general insurance business of plaintiff, and that this insurance was a part of that general business. Besides, it is practically undisputed that the premium, less the \$216, was paid by the defendants to plaintiff by a check made payable to plaintiff, that Hussey has never claimed this money for himself, and that he demanded it from the defendants for the plaintiff. We think the evidence amply sufficient to warrant the court in finding plaintiff the representative of the assurance company. We deem it un-

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necessary to discuss other evidence touching the correctness of the court's findings.

At the beginning of the trial, counsel for plaintiff, having some doubts as to the admissibility of evidence of custom under the complaint, orally asked the court for permission to amend the complaint, which was granted over the objection of defendants' counsel, which is now assigned as error. The words inserted by the amendment at that time are shown by the italics in the following quotation from the complaint. After alleging the contract for retaining commission by defendants, the complaint as amended proceeds: "It being understood and agreed, *that under the general and usual custom known to the defendants in such cases*, that if said policy was thereafter cancelled by the General Accident Company, that the premium including the share of the defendants should be returned," etc. It is plain from the admission of defendants' attorneys in the record they were not surprised, and they did not ask to have any continuance of the trial on that account. We think this is sufficient reason for holding that it was not error under the liberal rules of amendment permitted by our statutes. There is, however, another reason which to our minds makes it clear that this was not prejudicial. It will be noticed by the language of the amendment that it is a general custom which is here attempted to be pleaded. We understand the rule to be that a general usage or custom need not be pleaded in order to admit evidence thereof to throw light upon a contract, the terms of which are obscure, and which is dependent upon evidence of such general custom to make it plain. 12 Cyc. 1097; *Hewitt v. Week Lumber Co.*, 77 Wis. 548, 46 N. W. 822; *Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. 927; *Fish v. Crawford Mfg. Co.*, 120 Mich. 500, 79 N. W. 793.

In this case the custom was not depended upon to prove the entire contract, only that portion of it which related to the return of the commission with the balance of the premium upon cancellation of the policy—that is, the only part of the

contract which needs evidence of custom for its support. The evidence which followed showed conclusively that such was the general and usual custom, though there was some slight conflict as to the course such return premium and commission should take in reaching the insured. This, however, we think has nothing to do with the legal obligation on the part of the broker to return his commission upon cancellation. What the courtesies of the situation might require as between insurance agents we are not called upon to determine. We think it plain that all the evidence which was introduced as to general custom would have been admissible without this amendment as well as with it; hence, the allowing of it by the court was in no event prejudicial. This also disposes of defendants contention that the custom was not sufficiently pleaded.

Error is assigned based upon the court's refusal to admit in evidence a written contract of partnership between Hussey and the plaintiff. This was offered by defendants' counsel for the purpose of showing want of proper parties plaintiff, and also to show the necessity of pleading compliance with chapter 145, Laws of 1907, page 288, as to filing partner's names with the county clerk, but this contract was dated a considerable time after the matters arose, as is plainly shown by Hussey's testimony, and therefore was properly rejected by the court.

We are of the opinion that the lower court arrived at correct conclusions both as to the facts and law, and that its judgment should be affirmed. It is so ordered.

RUDKIN, C. J., CROW, GOSE, CHADWICK, MOUNT, MORRIS, and DUNBAR, JJ., concur.

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Syllabus.

[No. 7716. Decided May 3, 1909.]

C. H. SPENCER, *Plaintiff and Respondent*, v. ALKI POINT
TRANSPORTATION COMPANY, *Defendant and Respondent*,
AMERICAN SAVINGS BANK & TRUST COMPANY *et al.*,
Interveners and Appellants.¹

RECEIVERS—OF INSOLVENT CORPORATIONS—AUTHORITY—STIPULATION—STOCKHOLDERS—RIGHT TO APPEAL. Where the receiver and several stockholders of a corporation intervened in an action against the corporation, a stipulation of the receiver in the nature of a compromise, authorized by the court, binds the stockholders, as the receiver represents the stockholders as well as the corporation; and an appeal by the stockholders will not be considered.

BILLS AND NOTES—INDORSERS—PRESUMPTIONS. The fact that renewal notes were not signed by indorsers of the original note raises a presumption that they signed only as sureties.

BILLS AND NOTES—INDORSEMENT—PAROL EVIDENCE TO CONTRADICT—NATURE OF LIABILITY. Parol evidence is admissible to show that the indorsers signed as sureties although the note recited that every party signing or indorsing the note bound himself as principal and not as surety.

BILLS AND NOTES—CONSIDERATION. The maker of a note may show want of consideration.

CORPORATIONS—POWERS—SURETYSHIP. In the absence of evidence of power in the charter so to do, a corporation cannot become a surety upon a note.

SAME—DEFENSES—ULTRA VIRES. A corporation is not estopped to set up the defense of *ultra vires* to an action upon a surety obligation, where the evidence that it received the benefit of the contract is vague and uncertain.

TRIAL—CONDUCT OF CAUSE—REOPENING CASE FOR EVIDENCE—DISCRETION. It is not an abuse of discretion to refuse to open a case for the further evidence of the president of the company who had just returned after an absence of two months, where such president was the attorney of the company at the time it intervened, and failed in his duty to advise the attorneys as to the materiality of his evidence.

BILLS AND NOTES—TRANSFER—BONA FIDE PURCHASERS—NOTICE OF INFIRMITY. The fact that the first of four mortgage notes was overdue at the time of the assignment of the mortgage and notes, does not constitute notice of an infirmity in the three unmatured notes in the hands of innocent purchasers in good faith, especially where

¹Reported in 101 Pac. 509.

a payment of part of the principal and interest on the first note was indorsed as paid after its maturity; in view of Laws 1899, p. 350, § 56, defining notice of an infirmity in a negotiable instrument to be actual knowledge of the defect or of such facts as to amount to bad faith.

MORTGAGES—DEFAULT IN INSTALLMENTS—MATURITY. A provision in a mortgage that on failure to pay any of the notes when due, the whole sum shall become due, does not mature the whole debt.

BILLS AND NOTES—TRANSFER—BONA FIDE PURCHASERS. The bona fides of the purchase of notes made by a corporation to its president is not affected by the relations between the president and the corporation.

APPEAL—REVIEW—ESTOPPEL TO ALLEGE ERROR—STIPULATIONS. After a stipulation compromising the amount due "for the purposes of this judgment," a party cannot allege error thereon on the theory that the stipulation had no effect on a judgment in the supreme court.

BILLS AND NOTES—TRANSFER—BONA FIDE PURCHASERS. A transferee of notes after dishonor and suit, as security for an antecedent debt, is not a bona fide purchaser.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 27, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed in part and reversed in part.

R. P. Oldham, for appellants Coleman and Anderson.

H. R. Clise, for appellant Washington Trust Company.

Farrell, Kane & Stratton, for appellant American Savings Bank & Trust Company.

James A. Snoddy, for appellant Thomas, Receiver etc.

Geo. W. Saulsberry, for respondent Spencer.

GOSE, J.—The respondent Alki Point Transportation Company is a Washington corporation, and during the times hereinafter stated was engaged in equipping and operating a pleasure resort at Alki Point near Seattle. The respondent C. H. Spencer, at the times the several liabilities hereafter considered arose, was its president and general manager. The American Savings Bank & Trust Company and the Wash-

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ington Trust Company are corporations engaged in the banking business at Seattle. Pending the litigation, Josiah Thomas was appointed receiver for the Alki company. Anderson and Coleman are stockholders in the last-named company. On September 12, 1905, the appellant the Washington Trust Company made a loan of \$5,000, and received as evidence thereof a note of that date for such sum, signed by the said C. H. Spencer, and indorsed on the back thereof: "Alki Point Transportation Company, by C. H. Spencer, Pres., George V. Wilkes, Secy." Such note recited: "For value received, each and every party signing or indorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety." On such date the bank credited the account of the Alki company with \$5,000, at the request of either Spencer, Wilkes, or the bookkeeper of the Alki company. On the same date the Alki company, by its president and secretary, drew a check to such bank for \$5,000, and the same was thereupon placed to the credit of C. H. Spencer. At the time of the execution and delivery of such note, Spencer pledged to such bank, as security for such loan, fifteen hundred and forty-three shares of stock of the Alki company, then standing in his name. On February 24, 1906, the stockholders and directors of the Alki company, by a unanimous vote, adopted the following resolution:

"Resolved, that for the purpose of obtaining money to pay off the present indebtedness of the company, and for the purpose of further improving, developing and equipping the property as may be necessary in the conduct of its business, that we borrow the sum of \$10,000, and, in order to raise such sum and to evidence said indebtedness, we hereby authorize the president and secretary of this company to sign, seal and issue its four promissory notes, each for the sum of \$2,500, each to bear interest at the rate of 8 per cent. per annum, payable semi-annually, and said notes to be payable respectively six months, one year, eighteen months and two years after date, and that to secure the payment of the principal and interest of said notes, it is further resolved,

that the president and secretary of this company sign, seal, acknowledge, execute, and deliver a mortgage covering all the present and in the future to be acquired property of this company, real, personal and mixed, of whatever kind or nature, and all its rights, privileges and franchises which may be hereafter acquired."

On the same day the Alki company, by its president and secretary, executed and delivered to I. N. Just, four promissory notes, each drawn for the sum of \$2,500, due respectively in six, twelve, eighteen, and twenty-four months. The four notes were fair upon their face, and identical except as to the date of maturity. There was no reference on either note to any other note, or to any mortgage. At the same time, and to secure the payment of the indebtedness evidenced by such notes, the Alki company, by its president and secretary, made, executed, acknowledged and delivered to such payee a mortgage upon all of its property, in conformity to such resolution. The mortgage recited that its execution was authorized by its articles of incorporation, the laws of the state, and its stockholders and trustees, "for the purpose of further improving, developing, and equipping" its property. It further recited:

"But in case default be made in the payment of the principal or interest of said promissory notes or any part of, or either of them, when the same shall become due and payable according to the terms and conditions thereof, or if default be made in any other of the covenants and conditions hereof, then the party of the second part, his heirs, executors, administrators and assigns, are hereby empowered to sell the said premises and property with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the whole of said principal and interest whether the same shall be then due or not."

The notes also provided that a failure to pay interest as it became due should mature both principal and interest at the option of the holder. There is no evidence that Just gave any

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value for the mortgage. The mortgage was recorded March 14, 1906. On March 29, Just assigned the notes and mortgage to Spencer and the assignment was recorded March 31, following. On September 20, 1906, the appellant the American Savings Bank & Trust Company loaned to C. H. Spencer the sum of \$6,000. At such time Spencer assigned and delivered to it the notes and mortgage of the Alki company, as security for such sum and for such further advances as it should make. This assignment was recorded January 5, 1907. October 2, 1906, it advanced to Spencer on such security a further sum of \$1,500. At the time it made the loan of \$6,000, the note first maturing was overdue and had the following indorsement: "Paid \$1,000, August 23, 1906. Paid \$40 interest, August 23-06. Paid \$400 September 10, 1906."

November 14, following, Spencer commenced a suit for the foreclosure of the mortgage, alleged its provisions in case of default, and that all of the notes were due. He also alleged that he was the owner and holder of the mortgage. December 12, the appellants Coleman and Anderson, as stockholders of the Alki company, filed their complaint in intervention, wherein they affirmatively pleaded that the notes and mortgage were in fact made in the name of Just, but for the benefit of Spencer; that the actual amount due to Spencer from the Alki company at the time of the execution of the notes and mortgage, was about \$3,247.15; that at such time the company was unable to pay its obligations in the regular course of business. February 21, 1907, the appellant the American Savings Bank & Trust Company, by leave of court, filed its complaint in intervention, and alleged the making of the loan and the assignment of the notes and mortgage to it as security as heretofore stated. It further alleged that it recognized the interest of the plaintiff in the mortgage subject to the assignment, and that it desired the foreclosure of the mortgage. These matters were affirmatively pleaded. Through inadvertence, it would seem, it admitted the para-

graph of the complaint which alleged that the plaintiff was the owner of the notes and mortgage. February 27, following, the appellant the Washington Trust Company filed its complaint in intervention. It pleaded that the \$5,000 note, to which reference has been made, was a loan to the Alki company and Spencer; that subsequent to the assignment of Spencer to the American Savings Bank & Trust Company, and on January 6, 1907, the former assigned to it his right, title, and interest in the notes and mortgage subject to the former assignment. Josiah Thomas, as receiver of the Alki company, filed his complaint in intervention. He pleaded affirmatively, in substance, that Spencer was largely indebted to the Alki company on unpaid subscriptions to its capital stock, and for money that he had received and not accounted for; that Just took the notes and mortgage as an accommodation to Spencer; that the Alki company was insolvent. Issues were then joined by the several parties, and the case wherein the receiver was appointed was consolidated with this cause, and they thereafter proceeded as one action. Thereupon said cause was tried and submitted to the court for its decision, and all the parties to the action, except the appellants Coleman and Anderson, stipulated that for the purpose of "this judgment," the court should find that, before the commencement of the suit, Spencer had advanced and paid for the Alki company, and that there was due to him from such company on such advances, the sum of \$7,000, and the court so found and entered judgment accordingly.

The court also found, that there was no consideration for the notes and mortgage; that the appellant the American Savings Bank & Trust Company took the assignments of the note and mortgage as collateral security after the first of such notes was due; that at the time of the assignment the Alki company was not indebted to Spencer thereon; that such notes and mortgage were fraudulent and void; that the assignment of Spencer carried with it his indebtedness against the Alki company in favor of the American Savings Bank &

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Trust Company and Washington Trust Company, as security for their loans, first to the American bank, and second, to the Washington company; that there was due to the former company from Spencer \$7,500 and interest, and to the last-named company \$4,465 and interest, at the time of the commencement of the action; that the note of the Washington Trust Company did not create an indebtedness against the Alki company; that the latter's name was placed on the back of such note without authority, and that it received no consideration for such indorsement, as the Washington Trust Company well knew. The court then found that certain claims had been proved against the estate of the Alki company; whereupon the court drew and filed its conclusions of law and entered a decree according to such findings and conclusions.

As we have stated, all the parties to the appeal except Coleman and Anderson, who appeared as stockholders of the Alki company, stipulated in the court below, for the purpose of the judgment, that the indebtedness owing from the Alki company to Spencer was \$7,000, and the decree was entered for his assignees in this amount. The appellants Coleman and Anderson are undertaking to assign error as to this item. The appellants, other than the receiver, urge that they are bound by the stipulation of the receiver, and that they have no appealable interest. We think that this view must obtain.

"The receiver of an insolvent corporation represents not only the corporation, but also the stockholders and creditors, and it is his duty to assert and protect the rights of each of these several classes of persons." *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067.

"The court appointing a receiver may authorize him to compromise claims and suits against the estate if best for the interest of all parties concerned." 23 Am. & Eng. Ency. Law (2d ed.), § 1080.

This stipulation was entered into with the sanction of the court, to avoid the expense and delay of a reference, and is

in the nature of a compromise. For these reasons the appeal of Coleman and Anderson will not be considered.

We will next consider the appeal of the Washington Trust Company. We have noticed that its note was signed by Spencer, and indorsed on its back by the Alki company. Later there were two or three renewals, in one of which the note was signed by Spencer only. In the last renewal the note was signed the same as the first note. The fact that the Alki company indorsed the note, and the further fact that in a renewal it did not sign at all, creates a strong inference that it signed only as surety. In addition to this, both the president and secretary of the Alki company testified that it indorsed the name of the company on the note as surety at the request of the bank. The evidence that it so signed strongly preponderates. The negotiable instruments' act (Laws 1899, p. 345, § 16, subd. 6), provides:

"Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

It is argued that the note recites that all the parties signing or indorsing it bind themselves as principals and not as sureties, and therefore that parol evidence will not be heard to dispute it. It might as well be urged that the recital in an instrument to the effect that it was given for a valuable consideration foreclosed the parties to it from pleading either that it was conceived in fraud or that it was given without any value or consideration.

"It has been frequently held that a person signing a note on its face may show that he signed it as a surety and not as a principal." *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977.

See, also, *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724. The maker may also show there was no consideration for the instrument sued on.

The appellant has directed our attention to the case of *Donohoe Kelly Banking Co. v. Puget Sound Sav. Bank*, 13

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Wash. 407, 43 Pac. 359, 942, 52 Am. St. 57. This case merely holds that one who writes his name on the back of a promissory note before delivery is *prima facie* a joint maker.

"A corporation has no power to enter into a contract of suretyship or guaranty, or otherwise lend its credit to another, unless the power is expressly conferred by its charter, or unless such a contract is reasonably necessary or is usual in the conduct of its business. Ordinarily the simple act of becoming surety or guarantor for the contract or debt of another person or corporation is not within the implied powers of a corporation." 7 Am. & Eng. Ency. Law (2d ed.), p. 788.

See, also, *Washington Mill Co. v. Sprague Lumber Co.*, *supra*.

There is no evidence that the Alki company derived any power from its charter to engage to pay the debt of another, nor is there any evidence that it had theretofore entered into such engagements. It is also urged that a corporation, having received the benefit of such a contract, will not be heard to urge that it was *ultra vires*. This rule may be conceded in proper cases. It is unavailing to appellant. The evidence that it received a benefit, and, if so, to what extent, is too vague and uncertain to become the foundation of any right.

It is further urged that the court abused its discretion in refusing to reopen the case to admit evidence upon the part of the appellant. The case was commenced in November, 1906, the trial was had in December, 1907, and the decree entered June 27, 1908. The affidavit of counsel to reopen the case states that, after the trial of the case and on December 22, 1907, the president of the appellant returned from Europe, after an absence of about two months; that he did not know that the president knew anything about the facts prior to the close of the trial. It is the duty of a litigant to advise his attorney as to the facts of his case. Such an application is analogous to a motion for a new trial, and is so much within the discretion of the trial court that we will not interfere except in cases where there has been a clear

abuse of such discretionary power. In view of the record as stated, we cannot say that there was such abuse of discretion. *Kreielshaimer v. Nelson*, 31 Wash. 406, 72 Pac. 72. We conclude, therefore, that the Alki company indorsed the note as surety only, and without authority, and that the Washington company knew this fact.

We will next consider the appeal of the American Savings Bank & Trust Company. We have seen that the notes and mortgage were held to be void, for the reasons (1) that they were made to Just for the accommodation of Spencer, without any value or consideration; (2) that the first note was due at the time of their negotiation, and that the notes and mortgage, read together, show that the four notes arose out of one transaction, and that notice of the dishonor of the first note was constructive notice of any infirmity attaching to the notes not due. We have seen that the overdue note, at the time the notes were negotiated to the appellant, had an indorsement of the interest and \$1,000 as paid on the principal on August 23, 1906, and \$400 as paid September 10, 1906, which was ten days before they were negotiated to this appellant. That these payments had been made as of such dates has not been denied. The fact that the appellant took the notes and mortgage in the utmost good faith and advanced Spencer \$7,500, relying upon their being a valid and subsisting obligation of the Alki company, is not questioned in any way other than to invoke the rule that, under all the circumstances of the case, the notice that the first note was overdue was notice of whatever vice existed in the consideration for the other notes. Our negotiable instruments' act (Laws 1899, p. 350, § 56), defines what constitutes notice, as follows:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts as his action in taking the instrument amounted to bad faith."

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The receiver relied on the following authorities for an affirmation of the case as to this appellant: *Harrington v. Clafin & Co.*, 91 Tex. 294, 42 S. W. 1055; *Lybrand v. Fuller*, 30 Tex. Civ. App. 116, 69 S. W. 1005; *Stoy v. Bledsoe*, 31 Ind. App. 643, 68 N. E. 907. The *Harrington* case was a suit upon five promissory notes, one of which was overdue when they were negotiated. On the face of each note it was stated that it was given for a part payment for a certain parcel of land consisting of two hundred acres, which was described in the indorsement. The language of the statement was the same on each note. At page 301, the court said:

"What we decide upon this point is that, all of the notes being together and acquired at the same time by the assignee, it appearing in each note that they were parts of one consideration and constitute one contract, the dishonor of the first note, being overdue and unpaid, charged Clafin & Co. with notice that the same defense existed in favor of the makers against the notes not due, as against the overdue note."

In the *Lybrand* case the notes showed upon their face that they were given as a part consideration for the conveyance of certain land, and each note stipulated that the failure to pay any one of the notes when due should mature the others. They were negotiated after the first two notes were past due, and the court said the third note had "matured by contract, making the failure to pay any of the notes when due mature the others. Thus all of the notes, under their very terms, were past due when they were conveyed to the appellee." The court concluded that the indorsee under such circumstances was not an innocent purchaser of the notes, "he having acquired them after maturity." In the *Stoy* case, at page 909, the court, speaking upon this question, observed:

"The mortgage contained a clause to the effect that a failure to pay any one of said notes at maturity then all of them were due and collectible. Appellant took an assignment of the notes and mortgage chargeable with a knowledge of that provision of the mortgage, and he was bound to know

that by the terms of the mortgage both of the notes were past due."

We have adopted the view that such a provision in a mortgage does not mature the whole debt. *Coman v. Peters*, 52 Wash. 574, 100 Pac. 1002. In *Boss v. Hewitt*, 15 Wis. 285, four notes had been given, due respectively in one, two, three, and four years. They were fair on their face and secured by one mortgage, and negotiated when the first note and interest on each of the others were past due and unpaid. The court said:

"And we do not think that a purchaser of negotiable notes before maturity, can be held chargeable with notice of any defect in their consideration, from the mere fact that another note, secured by the same mortgage, was overdue and had not been paid."

It inferentially appeared that these notes were made upon the same date. In *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10, three notes had been given. Two of the notes, not due, were negotiated after one of the notes and the interest on the others were past due. The purchaser, knew of the existence of the overdue note. At page 291, the court said:

"... whether the plaintiff had knowledge of any infirmity in the notes, by having in his hands for collection the \$500 note which was overdue, or by the failure to pay interest on the notes when due. This question is, in effect, already answered by the fact that the answer alleges no fraud which could affect the notes, but only alleges a setoff. But, conceding that there was fraud in the transaction, the fact that another note given for the same consideration was due, or that interest on the notes remained unpaid, is no such notice as to affect the *bona fides* of the plaintiff's purchase of the notes in suit."

In *Bank of Edgefield v. Farmers Co-Operative Mfg. Co.*, 52 Fed. 98, the court quoted approvingly from Daniel, Negotiable Instruments, § 787, as follows:

"Where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored where one is overdue and unpaid."

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In *Noyes v. Landon*, 59 Vt. 569, 10 Atl. 342, the court, at page 346, treats this question in the following language:

"But in view of the general rules that prevail, and are applicable for the protection of the *bona fide* holders of current negotiable paper, we conclude that Noyes obtained a title discharged of all equities to the eleven notes that were transferred to him while current, and that Landon's defense is only applicable to the note that was past due."

This view is approved in an opinion by Mr. Justice Cooley, in *Hull v. Swarthout*, 29 Mich. 249.

Where bonds are negotiated to an innocent purchaser for value, with the unpaid interest coupons attached, the purchaser takes them discharged from all equities existing in favor of the maker. *Long Island Loan & Trust Co. v. Columbus etc. R. Co.*, 65 Fed. 455; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Indiana etc. R. Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554; *Bank of Edgefield v. Farmers Co-Operative Mfg. Co.*, *supra*. In the *Long Island* case thirty-six bonds, regularly issued, each of the denomination of \$1,000, each having two unpaid interest coupons attached, fraudulently pledged by the president of the road to an innocent purchaser for value to secure a personal debt, were held to have passed to the purchaser free from the equities of the maker of the bonds. Speaking to this question, in the *Cromwell* case, the court, through Mr. Justice Field, at pages 57, 58, say:

"The nonpayment of an installment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity, a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities. The nonpayment of the installment of interest represented by the coupons due at the commencement of the month in which the purchase was made by Clark was a slight circumstance, and, taken in connection with the fact that previous coupons had been paid, was entirely insufficient to excite suspicion even of any illegality or irregularity in the issue of the bonds."

If nonpayment of interest is insufficient to admit evidence of antecedent equities, the same rule would seem applicable to a failure to pay a part of the principal of one of the notes at maturity. The court observed, in the last case, that the payment had only been delayed from causes of a temporary nature. It would seem to follow that a payment of the interest and a part of the principal on the past due note at its maturity, and the payment of a part of the principal after its maturity, would strongly suggest that the maker was regarding it as a binding obligation. Moreover, the mortgage is a mere incident to the note. The assignment of the notes *ipso facto* passes the security. Had Spencer only assigned the notes, it could not be successfully urged that the bank had notice of dishonor, under any of the authorities to which our attention has been directed. If overdue interest, because the interest is only an incident, does not import notice of dishonor, how can the mortgage, under the circumstances in this case, be given any greater force? Again, Spencer, the holder, was the president and manager of the maker of the notes. As was said in *Indiana etc. R. Co. v. Sprague, supra*, at page 760:

"The fact that he was an officer of the company did not of itself preclude him from dealing in them, or throw the slightest suspicion on his title."

Indeed, it would seem as the accredited agent of the maker, his acts amounted to an implied representation on its part that the notes were a valid and subsisting obligation to the full amount of the three notes that had not matured. Nor can the maker complain that the bank relied upon the assurance of such manager. It was holding him out to the world as a man worthy of trust and confidence.

"Part payment of the bill or note after its maturity, by the drawer or indorser, is an acknowledgment of liability, and therefore alone and unexplained, is presumptive evidence that the liability was duly fixed according to law." 2 Daniel, Negotiable Instruments (4th ed.), p. 203.

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Looking at the question from the standpoint of reason, we are strongly impressed with the view that the payment indorsed on the note after its maturity would allay whatever apprehension might have arisen in the minds of the officers of the bank from the fact that the one note had matured and was not paid. Moreover, the evidence shows that the Alki company intended to have the notes and mortgage made to Just notwithstanding the fact that such course was not in strict accord with the resolution. When Spencer was on the witness stand, he was inquired of and answered as follows:

"Q. At the time that this mortgage was made to Mr. Just, it was the understanding and agreement between the incorporators that it was to be assigned by Mr. Just to you, was it not? A. Between the incorporators, the stockholders, the members of the corporation."

Counsel for the receiver urges that this answer of the witness was intended by him as a question. We do not so understand it, nor do we think that such an inference can be fairly drawn from the question and answer. It is reasonable to conclude that the notes and mortgage were made to Just and assigned to Spencer with the knowledge of the maker, and with the intention upon its part that he should negotiate them for its benefit. As against an innocent third party, it should not be heard to complain that he used them for his own advantage. But, aside from the status of the obligation as between the makers of the note and Just and Spencer, we think that the better rule is that, under all the surrounding circumstances, the bank took the three notes that were not due in good faith and for value and without notice. Indeed, it would seem that no other conclusion could reasonably be reached, if any effect is to be given to the section which we have quoted from our negotiable instruments' act. A corporation of necessity must act through its officers and agents, and where it has named a president and general manager, neither it nor its creditors will be heard to dispute his acts when a party has dealt with him as in this case, with every appearance of good

faith, and where such act is not *ultra vires* to the purpose of its incorporation.

The receiver is now urging that we should review the finding and decree as to the amount the Alki company was indebted to Spencer, and that his stipulation was only intended to be effective in the trial court as shown by the words "for the purpose of this judgment." In such cases this is not a court of original jurisdiction. We cannot say that the court committed an error in entering a decree for an amount which had been agreed upon by the interested parties.

The Washington Trust Company took its assignment from Spencer after the commencement of the suit and after the dishonor of all the notes, as security for the payment of an antecedent debt. It cannot, therefore, claim under the assignment. The disposition we have made of the case extinguishes the claim of Spencer against the Alki company.

The judgment will be affirmed as to Coleman and Anderson and the receiver, and as to the Washington Trust Company, except that it will take nothing through Spencer. The judgment will be reversed as to the American Savings Bank & Trust Company, with directions to the trial court to enter a decree for the full amount of its notes, principal and interest, together with one reasonable attorney's fee in its behalf.

In view of the fact that all the mortgaged property has been converted into money and is in the hands of the receiver, the court will direct him to pay such demand as a first preferred claim. The other claims will be paid in the order fixed in the original judgment. The American Savings Bank & Trust Company will recover its costs on appeal.

RUDKIN, C. J., FULLERTON, CHADWICK, CROW, MOUNT, and DUNBAR, JJ., concur.

MORRIS and PARKER, JJ., took no part.

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[No. 7459. Decided May 4, 1909.]

E. B. SUMMY, *Appellant*, v. S. V. RAMSEY *et al.*,
Respondents.¹

VENDOR AND PURCHASER—MARKETABLE TITLE. A vendee contracting for an abstract showing a good title is entitled to a marketable title, i. e., one free from reasonable doubt.

SAME—RESCISSION BY VENDEE. A purchaser will not be allowed to rescind for defects in title, where it appears that he advertised and failed to resell the property at a profit, repented of his contract, obtained an attorney's opinion searching out all possible defects, and refused to return the abstract for correction or afford reasonable opportunity to remove the alleged defects.

SAME—MORTGAGES—MERGER. An abstract shows a marketable title notwithstanding reference to an unreleased mortgage, where it appears from the abstract that the mortgage had been assigned to one R. who subsequently obtained the full title and conveyed with full covenants, there being at the time no other outstanding lien and no record of any assignment of the mortgage pursuant to Bal. Code, §§ 4565, 4566; since a merger of the mortgage was shown.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 3, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Alfred E. Parker, for appellant.

Austin E. Griffiths (*Paul Shaffrath*, of counsel), for respondents.

CROW, J.—This action was commenced by E. B. Summy against S. V. Ramsey and wife, to recover \$1,000 earnest money paid on a contract for the purchase of real estate. From a judgment in favor of the defendants, the plaintiff has appealed.

Appellant's controlling assignments of error are based upon his contention that the findings of the trial judge are not sustained by the evidence. The evidence shows the following

¹Reported in 101 Pac. 506.

facts pertinent to a consideration of this appeal: That on or about February 11, 1907, the respondents executed a written instrument, accepted by appellant, whereby they contracted to sell to appellant lots 1 and 2, in block 6, in W. R. Brawley's addition, and the east eighty-eight feet of lot 4, in block A, of Yesler's First addition, all in the city of Seattle, for the sum of \$45,000, payable \$1,000 cash, \$11,500 further cash on completion of the transfer, and \$32,500 by note and first mortgage deed on the property; that the contract also contained the following stipulation:

"Abstract of title to be furnished without delay, and the form of the conveyance is to be warranty deed, which is to be delivered within 30 days thereafter upon the receipt of the above \$11,500 cash payment, and the securities for deferred payments. And it is agreed and understood by said purchaser that if the title is not good, and *cannot be made good*, this agreement shall be void, and the vendor shall not be liable for any damage, and the said sum of one thousand dollars, earnest money, paid by the purchaser shall be returned to him. If the title is found to be good, and nevertheless not accepted by said purchaser (the deed being tendered), within the time and as herein named, said earnest money is forfeited as the consideration paid for this agreement, and the owners of said premises shall be considered to have fully performed on their part, and may declare this contract terminated. Time is made the essence of this agreement;" . . .

that appellant paid \$1,000 cash; that respondents delivered to him abstracts of title, which he handed to his attorney for examination and opinion; that pending such examination, appellant advertised and attempted to resell the property at an advanced price, but was unable to do so; that on March 13, 1907, appellant's attorney delivered to him a written opinion, in which he stated that the abstracts disclosed title in Samuel V. Ramsey, the respondent, and that a deed from him to his wife would convey good title upon correction of certain defects and irregularities; that the opinion then proceeded to point out eighteen separate defects and irregularities; that appellant on March 16, 1907, returned the ab-

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stracts and opinion to the respondent Samuel V. Ramsey, with the following letter:

"Seattle, Wash., Mar. 16th, 1907.

"Mr. Samuel V. Ramsey, City.

"Dear Sir:—I enclose herewith the opinion of my attorney Mr. A. E. Parker on title to lots 1 & 2, block 6 of W. R. Brawley's Addition and the east 88 feet of lot 4 in block A of H. L. Yesler's First Addition. From this opinion and after discussing all phases of this opinion with Mr. Parker, I am satisfied that your title is not good and would respectfully ask for the return of the earnest money of one thousand dollars.

"Opinion enclosed.

Yours truly,

"E. B. Summy;"

that on March 20, 1907, Ramsey wrote an answering letter to appellant, in which he contended there was no question but that the title was good; and stated that he declined to return the purchase money already paid; that without admitting the necessity therefor, he would endeavor to correct the alleged defects; that he would then have the abstracts extended and returned to appellant, and that he would tender a deed and make demand for the remainder of the purchase money.

The evidence further shows that respondent did attempt to make corrections; that on March 26, he returned the extended abstracts, with instruments making some corrections, to appellant for his consideration; that he offered to record such instruments if necessary; that he tendered a good and sufficient warranty deed, and demanded the remainder of the purchase money; that appellant received and retained the abstracts; that he declined to return them to respondent when demanded for further correction and extension; that he claims to have held them as evidence to show that the title tendered to him was not good; that on April 5, 1907, appellant wrote respondent, reiterating his objections to the title, insisting that it could not be made good, refusing to complete the purchase, and demanding a return of the \$1,000 paid by him, and that upon respondent's refusal to pay, he commenced this action.

The real issue before us is whether the abstracts did show a good title. Appellant contends that a vendor, who agrees to deliver an abstract showing good title, is bound to furnish one that shows not only a good but also a marketable title, and that the vendee cannot be compelled to accept an unmarketable title. This position is well taken, but suggests the question as to what in law constitutes such a good and marketable title as a reasonable purchaser should be compelled to accept. In *Eggers v. Busch*, 154 Ill. 604, 39 N. E. 619, the supreme court of Illinois defines a marketable title as follows:

“ . . . title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent, and intelligent person; one that persons of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for.”

In *Cummings v. Dolan*, 52 Wash. 496, 100 Pac. 989, this court said:

“Appellant’s contract calls for a ‘good and marketable title.’ The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt; in other words, that a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion; that he can only demand such title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept.”

The well-established rule that a vendee contracting for a good title is entitled to demand and receive a marketable title, has been adopted by the courts to protect him from such defects only as would cause a prudent and cautious purchaser to entertain a just apprehension of future trouble. It was not adopted to arm and equip the vendee with a sword of defense, in the form of technical and unsubstantial objections, to aid him in escaping liability in the event of his desire to avoid the obligations imposed upon him by the contract into which he has voluntarily entered. Courts of justice, in

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adopting such a rule, never intended that he should be permitted to suggest technical, frivolous, or unsubstantial objections, and insist upon their removal, in the hope that the vendor could not comply with his demands, and thus enable the vendee to avoid performance and do so without loss.

Maupin, in his work on Marketable Title to Real Estate (2d ed.), § 283, page 707, says:

"It is impossible in the nature of things that there should be a mathematical certainty of a good title. Such a thing as absolute security in the purchase of real estate is unknown. But a bare possibility that a title may be affected from certain causes, when the highest possible evidence of which the nature of the case admits, amounting to a moral certainty, is given that no such cause exists, does not render the title doubtful. The purchaser cannot demand a title absolutely free from all suspicion or possible defect. He can simply require a title such as prudent men, well advised as to the facts and their legal bearing, would be willing to accept. The doubts must be such as will affect the market value of the estate. They must not be made up for the occasion, based on captious, frivolous and astute niceties; they must be such as would induce a prudent man to hesitate in accepting a title affected by them."

From the evidence before us, we are convinced that the appellant, having failed to sell the property at a profit and fearing he could not do so, repented of his contract, caused his attorney to search out all possible objections, and then, by asserting the title to be bad beyond all possibility of cure, endeavored to avoid the performance of his contract and secure a return of his purchase money, without affording the respondent reasonable time within which to remove the alleged technical defects. This being true, he should not be permitted to recover.

It would unnecessarily extend this opinion were we to indulge in a discussion of each and all of the objections made. No one of them was of sufficient importance to justify the action of appellant, or warranted the rejection of the title

by any sincere, prudent, or honest purchaser. We will, however, notice one of the objections made. The abstract disclosed that, on August 16, 1890, H. G. Holmes and wife, then owners of the lots in Brawley's addition, executed and delivered a mortgage for \$3,000, to one George M. Van Doren. This mortgage did not appear to have been released of record. The abstract noted the additional facts that, on April 1, 1892, Van Doren, the mortgagee, by his written assignment duly executed, acknowledged, delivered, and recorded, transferred the mortgage to W. H. Ramsey; that afterwards, on May 25, 1896, W. H. Ramsey, by mesne conveyances, duly recorded, obtained title to the lots; that no other liens or incumbrances then existed, and that on June 4, 1901, W. H. Ramsey and wife, by warranty deed containing full covenants of title, conveyed the lots to Samuel Ramsey, from whom the respondent Samuel V. Ramsey has deraigned his title.

Respondent, in answer to appellant's objection that the mortgage was an apparent lien, not being released, insisted that when the mortgage and title both passed to W. H. Ramsey, a merger followed, and that the lien ceased to exist. He also stated that the note was barred by the statute of limitations, that it had been destroyed, and that he had the original mortgage in his possession, which he tendered to the appellant for inspection. Appellant now insists that the mortgage was such an apparent lien as to constitute a serious cloud upon the title and render it unmarketable, it not appearing from the abstract that at the time W. H. Ramsey obtained the title, he still owned the note and mortgage. He further contends that, as there was not, prior to the year 1897, any statute requiring assignments of mortgages to be recorded, the note and mortgage might have been transferred to an innocent holder for value, whose lien under the rule announced in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, would be fully protected.

A release of this mortgage would doubtless have been ob-

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tained and recorded by the respondent had appellant allowed him time to do so. In fact, he did obtain one prior to the trial. On the record disclosed by the abstracts a merger was shown. When a greater and lesser, or a legal and equitable estate, meet in the same person, it is the well-settled rule at law that the lesser or equitable estate is merged and ceases to exist. Whether a merger will be recognized in equity depends upon the interests of the parties and the surrounding circumstances. If there are outstanding liens against which it becomes necessary to protect the title, a merger will not occur. Equity will prevent a merger to promote substantial justice, but will not do so when its prevention would promote a fraudulent transaction, or carry into effect any unconscionable wrong.

"Whatever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented and a mortgage or other security to be kept alive, when this result would aid in carrying a fraud or other unconscientious wrong into effect, under the color of legal forms. Equity only interposes to prevent a merger, in order thereby to work substantial justice." 2 Pomeroy's Equity Jurisprudence (3d ed.), § 794.

In *Chase Nat. Bank v. Hastings*, 20 Wash. 433, 55 Pac. 574, this court said:

"We think the rule is quite well settled that, wherever it is more beneficial to the person taking the fee that the mortgage upon it should stand, that circumstance should control in determining the question of intention, and equity will give effect to it by preventing merger and treating the mortgage as a subsisting charge. But where, as in the present case, the whole title, legal and equitable, unites in the same person and there is no intervening outstanding interest or lien, and it cannot be perceived that the keeping alive of the mortgage will be to the advantage of the grantee or essential to the protection of any right, and where to do so will work a hardship upon third parties, the acceptance of the deed extinguishes the mortgage and a merger is deemed to have taken place."

It could not have been the intention of W. H. Ramsey to continue the mortgage lien; nor does any reason appear why

it would have been to his interest or advantage to do so. An act providing for the record of assignments of mortgages (Bal. Code, §§ 4565, 4566; P. C. §§ 6557, 6558), was passed in 1897. Were we to assume that W. H. Ramsey did not own the mortgage at the time he acquired title, but had transferred it to a *bona fide* purchaser for value, yet his assignee did not file his assignment for record after the act of 1897 came into effect, and W. H. Ramsey could have executed a valid release. When, by his warranty deed with full covenants of title, he, in 1901, conveyed the lots to Samuel Ramsey, he was, so far as the record disclosed, owner of the mortgage, and also of the title on which no other lien then existed. No court of equity would thereafter permit an enforcement of the mortgage lien against the title acquired by Samuel Ramsey or his grantees. If the holder of a mortgage obtains a deed to the mortgaged land and then conveys to another with full covenants of title, the mortgage is discharged by merger. *Pearson v. Bailey*, 180 Mass. 229, 62 N. E. 265. If the holder of a mortgage, having also acquired the title, treats the two estates as coalesced and assumes to convey with full covenants, such conduct is conclusive as to him, and a merger must be deemed to have irrevocably taken place. *Ames v. Miller*, 65 Neb. 204, 91 N. W. 250.

In the case last cited the facts appear to have been quite similar to those the appellant contends might arise here. The opinion is directly in point, and forcibly disposes of appellant's contentions. Appellant's other objections were equally devoid of merit. He was unwilling to allow the respondent any time within which to correct the title or remove the objections stated, but flatly refused to perform the contract on his part.

We find no prejudicial error in the record. The findings are sustained by competent evidence, and support the final judgment, which is affirmed.

RUDKIN, C. J., MOUNT, CHADWICK, PARKER, and DUNBAR, JJ., concur.

[No. 7470. Decided May 4, 1909.]

PEARL OYSTER COMPANY, *Appellant*, v. SEATTLE & MONTANA
RAILROAD COMPANY *et al.*, *Respondents*.¹

ATTORNEY AND CLIENT—EMPLOYMENT—HUSBAND AND WIFE—COMMUNITY PROPERTY—AUTHORITY OF HUSBAND. An attorney was authorized to represent a wife in the settlement of condemnation proceedings against community property, where it appears that both husband and wife were parties and served with process, that he was employed by the husband, as he presumed, to represent both, and the husband was authorized by the wife to employ counsel in the case and he understood the attorney was to represent her.

EMINENT DOMAIN—COMPENSATION—WAIVER—EJECTMENT—TO RECOVER RAILROAD RIGHT OF WAY—ESTOPPEL. After condemnation proceedings for a railroad right of way are instituted, the owners may by oral agreement stipulate as to the compensation and waive their constitutional right to have it paid before the land is taken; and after standing by and seeing the land used for railway purposes for many years, they cannot maintain ejectment.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 18, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

Dorr & Hadley and *Rose & Craven*, for appellant.

L. C. Gilman and *B. O. Graham*, for respondents.

DUNBAR, J.—This is an action in ejectment, brought by the Pearl Oyster Company, a corporation, against the Seattle & Montana Railroad Company, a corporation, and the Great Northern Railway Company, a corporation. The plaintiff derails its title as follows: It acquired a deed thereto from William Hedge and wife, and William Hedge and wife acquired a deed thereto from J. B. McMillan and wife, who obtained title from the state of Washington. McMillan and wife, on the 13th day of September, 1898, entered into a contract with the state of Washington for the purchase of

¹Reported in 101 Pac. 503.

these lands, and patent was subsequently issued, viz., on the 28th day of March, 1904, and the deed from McMillan and wife to Hedge and wife was executed on the 27th day of April, 1904. The complaint, in substance, alleges that, in the year 1901, the defendants wrongfully and without any right or license, entered into and upon and took possession of a portion of said land, viz., the portion in dispute, and thereupon commenced the grading and construction of a roadbed for a standard gauge railroad over the entire length of said strip, and erected and created thereon a permanent barrier between the shores of Samish Bay and the waters thereof; and that they have wrongfully excluded plaintiff therefrom and deprived it of possession thereof; alleging certain damages, which allegations were afterwards withdrawn.

The defendants served a joint answer, which consisted practically of a general denial of the allegations of plaintiff's complaint; admitting, however, that they had excluded the plaintiff and all other persons therefrom, and that since 1901, they had had the exclusive possession of said strip of land. They also set forth two affirmative defenses, the first to the effect that they constructed their line of railway over and across the premises described in the complaint during the year 1901; that ever since said date they have been in possession of said property, openly, notoriously, and exclusively, and during the whole of said time have been using, and are now using, the property so described as a right of way for their railway line; that they are common carriers of freight and passengers; that the premises described in the complaint are part of the right of way of said railway, necessary to enable them to perform their duties to the public as a common carrier, and that at the time the defendants constructed their said line of railway, no objection was made by the owners of property, nor did they ever make any protest or objection to the defendants' occupying and using said property for railroad purposes; that the said line of railway was fully constructed and operated at the time plaintiff purchased said

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property, and that the plaintiff, at the time of purchase, knew said line of railway had been constructed and was in operation across said property.

For a second affirmative defense it was pleaded that neither the plaintiff nor any ancestor of it, nor any predecessor or grantor of the plaintiff, was seized or possessed of the premises described in the complaint within ten years before the commencement of this action, but the said defendants have been at all times since the year 1901 in possession, etc. The plaintiff filed motions to strike these affirmative defenses, and afterwards demurred to them. The demurrer as to the first affirmative defense was sustained, and overruled as to the second. Subsequently plaintiff filed its reply to defendants' second affirmative defense, denying the material allegations. Thereafter, on the 26th day of March, issues in the case having been joined, defendants asked permission to file an amended answer in the case, to which the plaintiff objected; which objection was sustained by the court, to which the defendants excepted, and the case proceeded to trial. The case was tried by the court, and the issues found in favor of the defendant.

The court made findings of fact and, among other things, found the corporate capacity of the different parties to the action; the deraignment of title as we have indicated in the statement of the case; that on or about the month of June, 1901, the defendant Seattle & Montana Railroad Company filed a petition in the superior court of the state of Washington for the county of Skagit, against said J. B. McMillan and Frances C. McMillan, his wife, to condemn a right of way over and across the premises described in the complaint, and such proceedings were afterwards had that, on the 28th day of June, 1901, said court made an order directing that a jury be called for the purpose of assessing the damages to be paid for such right of way; that nothing further was had or done in such proceeding in court; that on or about the 28th day of June, 1901, the said railroad company and the said J. B. McMillan, for and on behalf of himself and his wife, Frances

C. McMillan, the then owners and holders of said contract with the state of Washington, entered into a verbal agreement whereby it was understood and agreed that, in consideration of the sum of \$300 and other considerations, said railroad company might have a right of way over and across, and might construct and operate its railroad across, the premises hereinbefore described; that subsequent to the said 28th day of June, 1901, and immediately subsequent to the making of the agreement above mentioned, the defendants, in pursuance of said agreement and with the knowledge and consent of said McMillan, entered upon and took possession of a portion of the land (describing it), which is the portion occupied by the railroad companies defendants, and created and constructed a roadbed for a standard gauge railroad over and across the entire length of said strip, and thereafter did continuously prosecute the work of construction, and did erect and create upon the entire length of said strip of land a permanent roadbed and grade, and upon the completion of the grade the defendants caused to be placed thereon railroad ties and rails for railway purposes, and have ever since the fall of 1901, continued to and are now continuing in the maintenance and operation of a railway over and across said strip of land, and have been and are now conducting thereupon a general railway business, both passenger and freight; that said strip is, and at all times has been, the same strip of land or right of way which has been and now is occupied and used by the said defendants in the operation of their railway business; that since the defendants entered upon and took possession of said strip of land, they have had and now have open, notorious, and exclusive possession of the same, for the purposes of grading, constructing and operating said road; that the money consideration agreed upon between defendants and plaintiffs has never been paid; that at all times in the findings mentioned said J. B. McMillan and Frances C. McMillan were husband and wife, and that the land described

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was purchased with community funds. To these findings of fact the plaintiff excepted.

A careful examination of the record in this case convinces us beyond any reasonable doubt that the findings of the court were justified by the testimony in the case. There is no question whatever but that this contract to take \$300 for the right of way was entered into by J. B. McMillan and the railroad companies, and the only question is as to the rights of Mrs. McMillan in the premises, the property being community property. But we are also satisfied from the testimony of Judge McBride, and also from the testimony of McMillan himself, that Mrs. McMillan's interests were legally disposed of. Judge McBride testified, that he was employed in the condemnation proceedings by McMillan; that he presumed he was representing McMillan and his wife; that it must have been that he was representing anybody whom it was necessary to represent in the proceedings. Both Mr. and Mrs. McMillan had been served with summons in the case and, while it does not appear that McBride had any personal talk with Mrs. McMillan, it does appear, even from the testimony of Mr. McMillan, although he stated that his wife did not know anything about this particular tract of land, that she authorized him to employ counsel in the case in which the matter was settled. In answer to the question: "Do you remember whether you employed Governor McBride for Mrs. McMillan or both of you?" he said.

"If there was any matter in law, he was my attorney and took any case I had. If she was involved, I suppose he would represent her as well as me. She would leave the selection of the attorney to me." Q. "You were both parties to that proceeding?" A. "Yes, sir."

In the face of this testimony and of the further significant fact that the appellant did not see fit to summon Mrs. McMillan to testify in the case, it seems conclusive that Mrs. McMillan was represented in the settlement of the controversy, and that she cannot now be heard to complain that her

rights were adjudicated and settled without any representation on her part; and, of course, the appellant can have no greater rights than she had.

Many constitutional questions which are raised by the appellant do not seem to us to be involved in this case. It is certainly the established law of this state that private property cannot be taken without just compensation having been paid therefor. But this in no way affects the principle of estoppel or waiver. Undoubtedly a constitutional right may be waived as fully as any other legal right, and the constitutional right of having money paid for this right of way before the land was taken was certainly waived by the McMillans in this case. The undisputed testimony shows that, after this arrangement was made, they stood by for many years, saw the land taken possession of by the respondents, vast and expensive improvements placed thereon, and public business inaugurated and carried on for years. The transaction comprised an executed contract, with the defendants placed in possession. The testimony is conclusive and undisputed that McMillan told the attorney for the railroad companies that they might proceed with the work and that he would not interfere. The conclusion that the findings of the court in this case were correct practically decides this case.

In *Kakeldy v. Columbia & Puget Sound R. Co.*, 37 Wash. 675, 80 Pac. 205, in a case involving the same principle involved in this case, although of course different in some of its circumstances, this court said:

"In the case at bar the respondent is a quasi public corporation, a common carrier, possessing the power of eminent domain. Its railroad was built and in operation before appellant purchased his property. He purchased the property with knowledge of the existence and operation of the railroad, stood by and saw it operated and improved, without objection, and then, after the lapse of years, brought this suit to enjoin its operation;"

and the court held that it was estopped under the circumstances. It is contended by the appellant that the principles

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enunciated in this case were repudiated in the case of *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062. But an examination of that case convinces us that this statement is erroneous, and that the case was decided on questions which had no bearing on the question discussed in the *Kakeldy* case. In the *Slaght* case the court held that a possessory action can be maintained to recover possession of a railroad right of way, used and occupied by a railroad company for its roadbed for public purposes, where proceedings are stayed, and the only effect of the judgment is to compel the company to make compensation for the property taken, the court saying:

"If a judgment in ejectment at law, or decree of injunction in equity, would have the effect of stopping the operation of the railroad, or disabling it from discharging its duties to the public, there would be strong and controlling reasons why such judgment or decree should not be awarded. But, if proceedings are stayed as in this case, and the only effect of the judgment in ejectment is to compel the railway company to make compensation for the property taken, we see no valid objection to such proceeding, on the ground of public policy or otherwise."

So that it would seem that, instead of that case being opposed to the judgment of the court in this case, it sustains it; for this is not an action to compel the railroad company to pay the compensation agreed upon, for the company in this case stands ready and willing to pay that, but it is an action which falls squarely within the first proposition suggested by the court above, viz., that if the action were sustained it would have the effect of stopping the operation or disabling it from discharging its duties to the public.

It is not necessary to discuss *seriatim* the assignments presented in appellant's brief. We think the whole case depends upon the testimony adduced, and that the judgment under the testimony should be affirmed.

RUDKIN, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7647. Decided May 4, 1909.]

EDGAR GAGE, *a Minor*, by *J. I. Seward*, his *Guardian Ad Litem*, *Respondent*, v. SPRINGSTON LUMBER COMPANY,
Appellant.¹

MASTER AND SERVANT—YOUTHFUL EMPLOYEE—ASSUMPTION OF RISKS—QUESTION FOR JURY. In an action by a youth 15 years of age, injured on a cut-off saw, whether the dangers were obvious and ought to have been avoided is for the jury, where it appears that he was put to work on the saw, which was out of repair and unsafe, without being warned of the increased hazards.

SAME—DUTY OF MASTER—INSTRUCTIONS TO JURY. Instructions as to the duty of a master to a youthful employee are not erroneous as assuming questions proved, where they were but the statement of general rules under the issues, and other instructions properly submitted such issues to the jury.

SAME—An instruction as to the involuntary contact of an employee with a saw is not erroneous as failing to define "involuntary."

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 4, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor employee in operating a cut-off saw. Affirmed.

Danson & Williams and *Peacock & Ludden*, for appellant.

Robertson & Rosenhaupt, *T. H. Wilson*, and *John C. Kleber*, for respondent.

FULLETON, J.—This is an appeal by the defendant from a judgment for plaintiff, entered in an action brought to recover damages for personal injuries. The cause was before this court on a former appeal, and will be found reported in 47 Wash. 141, 91 Pac. 558. The second trial was had on the issues as originally framed, which are clearly and lucidly stated in the former opinion.

¹Reported in 101 Pac. 501.

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The first error assigned is the refusal of the court to sustain the several challenges interposed to the sufficiency of the evidence. It is contended first that there was no evidence of negligence on the part of the defendant. The evidence is voluminous and it would not be permissible to enter upon its review at length, but we find substantial evidence in the record on this point. The plaintiff's proofs tended to show that, at the time of the accident, he was but fifteen years of age; that he was put to work on a cut-off saw both out of repair and of unsafe construction, and was not instructed as to the safe ways of operating the saw, nor warned of the increased hazards arising from its defective condition. With respect to an adult, who might be expected to see and know the hazards connected with operating a saw in the condition of this one, it might not be negligence to direct him to work therewith without warning him of the dangers he would encounter, but we cannot apply the rule to a youth of the age of this plaintiff. Whether the dangers were so open and obvious that one of his age and experience ought to have observed and avoided them was a question for the jury. The court cannot hold him accountable as a matter of law.

The contention that the accident was the result of the plaintiff's own negligence we think is equally without support in the record. The most that can be claimed on this point is that the evidence was conflicting. Nor do we think the defendant has succeeded in demonstrating that it is physically impossible for the accident to have happened if the plaintiff was, at the time of the injury, in the position he testified he was in. It will be remembered that the plaintiff operated a cut-off saw, fastened to a swinging frame, which allowed the saw to be pulled forward across the slab it was desired to cut. Fastened to the base on which it was hung was a heavy iron bar bent in the shape of a half circle which the plaintiff used as a handle to pull the saw through the slab. He described the accident as happening when he was in front of the handle pulling the saw through a slab with his right hand; saying

that, when he did so, the saw caught on the slab and suddenly jumped forward, catching his arm and cutting it off at the elbow. The defendant argues that this statement cannot be true, because the handle of the saw, when he had been in the position described, would have caught him on the breast and pushed him away from the saw out of danger. But clearly this is mere speculation. Had the handle struck him squarely it might have done so, but it would seem that if he happened to be on one side of the center, the tendency would be to push him farther in that direction than directly backwards.

The court, among others, gave to the jury the following instructions:

"In this case it is claimed on behalf of the plaintiff that he is a minor, and was at the time of the happening of the accident of the age of 15 years. I instruct you that while a minor employee is held to have assumed the risk of the employment, yet it is only such risks as one of his age, discretion and experience can be said to have comprehended, and he may recover for injuries resulting from dangers that by reason of youth, immaturity and inexperience, he was unable fully to comprehend, and the perils of which had not been explained to him.

"You are instructed that it is the duty of an employer to give to a minor such general instructions as to the danger of working at a cut-off saw as would reasonably inform the minor of the danger incident to the business, considering the experience that the minor had in the business, if any, degree of intelligence and his capacity to perform the work, and such instructions should be given as would satisfy a reasonably careful and prudent person that the minor was informed of the danger that would be likely to befall a boy of the same age while working around the place where he was injured; and the defendant in this action should have exercised reasonable care in instructing the plaintiff as to the safe manner of performing his duties, and warning him of the dangers of adopting other and unsafe measures.

"I instruct you that an employer owes to the employee the duty and obligation to supply a place reasonably safe, and proper appliances, calculated when used safely to perform the work without danger, except such as is apparent therein,

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and the employer owes such obligation to the employee continuously and when a danger arises in the use of an appliance by reason of the defective condition thereof, known to the master, it is the duty of the master to especially instruct upon such danger of such defective appliances, unless the same is patent and obvious or known to the employee, and the danger thereof is reasonably understood by the person operating the same.

"I further instruct you that if you find that there was a danger from involuntary contact which would be brought about by the improper use of the saw, which danger must be guarded against by the operator, in connection with guarding against the voluntary contact of the body of the person with the saw, it is for you to determine from all the testimony whether or not such danger would be comprehended by a boy of the age and discretion of the plaintiff; and it is for you to determine to what extent a boy of such age, understanding and experience should be instructed in order to comprehend the dangers arising from such use as the saw was designed for, and you are to judge to what extent, if at all, the plaintiff should have been warned and instructed in the light of the facts in this case and circumstances thereof."

Of the first, it is contended that it assumes that the hazards pertaining to the plaintiff's employment had not been explained to him; of the second, that the jury could fairly infer from its latter clause that the court meant to instruct them "that the defendant failed to exercise reasonable care in instructing the plaintiff;" of the third, that the court assumed and instructed the jury that there were defective appliances in use in the defendant's mill with which the plaintiff was required to work; and of the fourth, the following:

"This instruction was error. If the jury were to pay any attention to this instruction, they can come to only one conclusion. That is, that any contact with the saw which could have by any means been guarded against by the defendant was negligence on the part of the defendant. This would include the plaintiff's own accidental falling against the saw. If we are to understand anything from involuntary contact as mentioned by our supreme court, it is a contact with a saw that would be caused by operating the saw by a person who

was ignorant, and that by reason of his ignorance he would be injured by the saw. The instruction is error for the reason that it does not define what the court means by involuntary contact. As the instruction stands, it would include every contact with the saw, whether accident of the plaintiff or whether it was failure of the defendant to properly instruct, or through any other negligence of the defendant or plaintiff, and for this reason was misleading to the jury, giving the impression that every contact with a saw by the plaintiff was negligence on the part of the defendant."

None of the criticisms appear to us to be just. Manifestly in the first three of the instructions, at least, the court did no more than lay down general rules as to the duties of the defendant under given circumstances, intending them as a guide to the jury when they should come to consider the facts. Elsewhere the court had instructed them as to the issues in the case, telling them that these very questions which it is thought the court here assumed as proved were questions for them to determine from the evidence, and that they were the sole judges of the facts. In the light of this, it seems impossible that the jury could have been misled. It needs no elucidation to show that the criticism of the fourth instruction is not merited. Surely the word "involuntary" cannot be so uncommon that people of ordinary understanding are presumed not to know its meaning.

Other assignments go to the sufficiency of the evidence, and have already been noticed.

The judgment is affirmed.

RUDKIN, C. J., CROW, CHADWICK, DUNBAR, GOSE, MOUNT, and PARKER, JJ., concur.

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Opinion Per MOUNT, J.

[No. 7537. Decided May 5, 1909.]

J. S. BUCK *et al.*, *Appellants*, v. OREGON RAILROAD &
NAVIGATION COMPANY, *Respondent*.¹

CARRIERS—LIVE STOCK—LIMITATION OF LIABILITY—SAFETY OF STOCK PENS—VALIDITY—CONSTRUCTION. A provision in a contract for the shipment of stock requiring the shipper to inspect cars and stock pens and to report any visible defects and demand repairs, on pain of accepting their sufficiency, does not relieve the company from liability for negligence in failing to furnish suitable stock pens, as it would be void if so construed; and it only requires the shipper to assume liability when the defect is known or plainly visible to a casual observer.

SAME—INSPECTION BY SHIPPER—EVIDENCE—SUFFICIENCY. The shipper of stock does not assume the liability for loss of stock that escaped from a stock pen through a gate negligently fastened with a bent hook which yielded to pressure on the gate from the inside, and which had been in that condition for some time, where it appears that he was taken to inspect the pen at night, that it was the only one unoccupied, that he walked around it, and found it apparently sufficient and in good condition and the gate fastened.

SAME—QUESTION FOR JURY. Where a stock pen was secure except that the gate was fastened with a bent hook that yielded to pressure on the gate from the inside, and in the morning the gate was found open, whether the escape of the stock was due to the defective hook is a question for the jury.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 20, 1908, granting a nonsuit at the close of plaintiffs' case, dismissing an action to recover the value of live stock placed in defendant's stock pens. Reversed.

Tustin & Moore and *R. S. Cordiner*, for appellants.

W. W. Cotton, *W. A. Robbins*, and *Samuel R. Stern*, for respondent.

MOUNT, J.—This action was brought by the appellants to recover for the loss of six head of horses and the expense of

¹Reported in 101 Pac. 491.

gathering fifty-seven head of cattle, which escaped from the stock pens belonging to respondent near Spokane. The case was tried to the court and a jury. After the plaintiffs had submitted their evidence in support of the complaint, the defendant moved for a nonsuit, which motion was granted, and the action dismissed. The plaintiffs appeal.

It appears from the plaintiffs' evidence, that the defendant is a common carrier of freight; that on May 7, 1907, the defendant agreed to transport two car loads of live stock, consisting of fifty-seven head of cattle and six head of horses, from Colfax, in this state, to Innisfail, Alberta, Canada. The stock was delivered to the defendant on May 8, and loaded on its cars at Colfax on that day. About the time the stock was loaded on the cars, plaintiffs signed a contract which provided, among other things, as follows:

"The shipper agrees to inspect the cars in which such stock is to be transported and any yards or inclosures on the premises of the railroad company into which said stock may be unloaded and satisfy himself that they are sufficient and safe and in proper order and condition, and shall report to the agent or employees of said carrier any visible defects therein and demand necessary repairs before proceeding to occupy said cars or inclosures, and the fact of his loading said stock into said cars or occupying said inclosures shall be an acknowledgment and acceptance by him of the sufficiency and suitability in every respect of said cars and inclosures for shipment and yarding thereof."

After the stock was loaded into the cars, the train left Colfax at about ten o'clock in the forenoon of May 8, 1907, and arrived at Spokane at about ten o'clock that night. Plaintiffs requested the defendant to take the cars to the stock pens of the company located about two miles out of the city of Spokane, so that the stock might be unloaded for food, rest and water. The defendant thereupon transferred the cars to the stock pens, where they arrived at about one o'clock at night. All the pens were full of stock, except one. The stock was unloaded into this pen. Mr. Buck, one of the plaintiffs, thereupon walked around the pen on the walking

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board on top of the pen. He examined the gate, by looking at the same and shaking it with his foot. He saw that it was fastened. It "appeared sufficient," and the stock were left there for the night. All the parties returned on the engine to Spokane, for lodging for the night.

The next morning at six o'clock they returned to the stock pens, and found all of the cattle and horses gone. The cattle were gathered again by the plaintiffs within a few days, but the horses were not found. The fastening for the gate was a common iron hook. The shank of this hook was bent so that the gate was apparently secure. Pressure upon the gate from the inside would cause the hook to fly out of the staple and let the gate swing open. It was shown that this hook and gate had been in that condition for some time prior to the time the stock were placed in the pen. No chain or other fastening for the gate had been provided by the railway company. Upon substantially these facts, the trial court was of the opinion that the plaintiffs failed to comply with their contract of shipment, because they did not examine the inclosure sufficiently to notice apparent defects therein; that the gate fastening was apparently deficient, and could have been easily discovered, and that it was plaintiffs' duty under the contract to make the discovery, and for that reason granted the nonsuit and dismissed the action.

We think the trial court erred in this ruling. If this provision of the contract is valid, it is so because it does not relieve the carrier of its common law duty to furnish proper facilities for and to safely transport the appellants' property, and also because it is not an attempt to limit its common law liability so as to exempt the carrier from the consequences of its own negligence or that of its servants.

"The carrier is bound to furnish good and sufficient stock pens and yards at its depot for the shipment of cattle and other live stock, and such other facilities as may be necessary for the safe and convenient loading of the stock. The shipper is entitled to recover for all damages sustained by his property in consequence of a failure by the carrier to furnish such

facilities or to keep them safe, and the carrier cannot be relieved from such liability by showing that the shipper saw the stock pens or knew of the defects in them." 5 Am. & Eng. Ency. Law (2d ed.), p. 430, and authorities there cited.

In the case of *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190, the supreme court of the United States, at page 268, said:

"It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of *Baltimore & Ohio S. W. R. Co. v. Voight*, 176 U. S. 498, 505, 507, 20 Sup. Ct. 385, 44 L. Ed. 560, and *Knott v. Botany Worsted Mills*, 179 U. S. 69, 71, 21 Sup. Ct. 30, 45 L. Ed. 90, 93, where the previously adjudged cases are referred to and the principles by them expounded are restated."

This is the general rule, and is apparently conceded by the respondent. If the provision of the contract under consideration was intended to impose upon the shipper the duty of inspecting the cars and inclosures belonging to the railway company, which duty legally rests upon the carrier, the provision would be void. But if we assume that the provision is not void because it does not attempt to evade the legal duty of the carrier, but is only an added precaution which the carrier imposed upon the shipper in order to secure greater safety in the shipment, then the shipper will be required to use reasonable diligence only, and his failure to observe and report visible defects would not take away his right to recovery, unless he was negligent and loss was caused by such negligence. In other words, if the shipper in this case had found the gate open or the fence decayed or down, and knew the pen was not safe to put his stock into, he no doubt would have been required to notify the company, or make the place

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safe himself before placing his stock therein. But that is not the condition in this case. The shipper was taken out to the place in the night, at one o'clock, a starlight night. The pen was apparently in good condition. No other pen was available. He was required to use the one he did use. He walked around the top of it. The gate was closed and apparently fastened with the appliance provided by the carrier for that purpose, and there was no other appliance at hand. The shipper placed his foot on the gate and it appeared sufficient. Under these circumstances he clearly had a right to assume that the carrier had done its duty, and had furnished a sufficient appliance. He was not required to make a critical examination of the appliance to see that it was proper and safe. We think the provision of the contract above quoted can be construed only as requiring the shipper to assume liability when the defect is known or is plainly apparent and visible to a casual observer, which was not the case here. The trial court was apparently of the opinion that it was the duty of the shipper to make a careful inspection, such as is required of the carrier, and to discover defects. But this, as we have seen above, is not a correct interpretation of the contract. The evidence was sufficient to go to the jury upon the question of negligence of the shipper.

Respondent argues that the evidence was insufficient to show that the appellants' stock escaped by reason of the defective latch upon the gate. The trial court did not pass upon this question, but based its ruling entirely upon the duty of the appellants under the terms of the contract. We think the circumstances surrounding the escape of the stock were sufficient to go to the jury, as to whether or not the defective latch was the cause of the loss, and that the court erred in granting the nonsuit.

The judgment is therefore reversed, and the cause remanded for a new trial.

RUDKIN, C. J., CHADWICK, CROW, PARKER, and DUNBAR, JJ., concur.

[No. 7577. Decided May 5, 1909.]

TENA BUTLER, *Appellant*, v. SUPREME COURT OF THE
INDEPENDENT ORDER OF FORESTERS, *Respondent*.¹

INSURANCE—DEATH—PRESUMPTION FROM ABSENCE—TIME OF DEATH—EVIDENCE—QUESTION FOR JURY. The sudden unexplained disappearance and absence of a man for seven years raises a presumption of death, the time thereof being a question for the jury; and in an action for insurance, where it appears that the man was under middle age, with a wife and two small children, and was strongly attached to his family, respected in the community, and in good circumstances, the jury would be justified in finding that death was the cause of his disappearance (Mount and Chadwick, JJ., dissenting).

SAME—DEFENSES—ESTOPPEL—INCONSISTENT CLAIM IN PRIOR ACTION—MUTUALITY—PREJUDICE. A wife who, upon advice of counsel, secured a divorce for the purpose of clearing up the title to real estate (her husband having suddenly disappeared some years before without any explanation, and all efforts to find trace of him having failed) is not estopped, after the lapse of seven years from the date of his disappearance, from bringing an action on a benefit certificate upon his life and claiming therein that he was dead at the time the action for divorce was commenced; especially where such estoppel would not be mutual and did not mislead or injure the other party.

SAME—WHO MAY CLAIM—PREJUDICE. An estoppel cannot be pleaded or relied upon by one who was not injured or did not rely upon the acts constituting it.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 18, 1908, in favor of the defendant by direction of the court, upon discharging the jury, dismissing an action on a benefit insurance certificate. Reversed.

Belden & Losey, for appellant, cited: *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136; *Whiteley v. Equitable Life Assurance Society*, 72 Wis. 170, 39 N. W. 369; *Hancock v. American Life Ins. Co.*, 62 Mo. 26; *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797; *Reedy v. Milliken*, 155 Ill. 636, 40 N. E. 1028; *Hunter v. Hunter*, 111 Cal.

¹Reported in 101 Pac. 481.

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261, 43 Pac. 756, 52 Am. St. 180, 31 L. R. A. 411; *Dahlman v. Forster*, 55 Wis. 382, 13 N. W. 264; *Heagany v. National Union*, 143 Mich. 186, 106 N. W. 700; *State ex rel. Spencer v. Moore*, 33 N. C. 160, 53 Am. Dec. 401; *Spencer v. Roper*, 35 N. C. 333; *Doe v. Nepean*, 27 Eng. C. L. Rep. 42, 5 Barne & Adolph. 42; *Nepean v. Doe*, 2 M. & W. Exch. 893; *Doe v. Jesson*, K. B. (1805) 6 East 80; *In re Phene's Trusts*, L. R. 5 Eq. 346; *State v. Plym*, 43 Minn. 385; *Wentworth v. Wentworth*, 71 Me. 72; *Policeman's Benevolent Ass'n of Chicago v. Ryce*, 213 Ill. 9, 72 N. E. 764, 104 Am. St. 190; *Williams v. Williams*, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253.

Samuel R. Stern, for respondent, contended, among other things, that the plaintiff was estopped. 16 Cyc. 679; 11 Am. & Eng. Ency. Law (2d ed.), 389, 446; *Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578; *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431; *Campbell v. Stephens*, 66 Pa. St. 314; *Olympia v. Knox*, 49 Wash. 537, 95 Pac. 1090; *Phillips v. Olympia*, 21 Wash. 153, 57 Pac. 347; *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070; *Cloud v. Lawrence*, 12 Wash. 163, 40 Pac. 741; *Scott v. Mathews*, 25 Wash. 486, 65 Pac. 756; *State v. Thompson*, 116 La. 829, 41 South. 107; *Stine v. Goodman*, 29 Ky. Law 221, 92 S. W. 612; *Layne v. Layne*, 28 Ky. Law 810, 90 S. W. 555; *Jones' Estate v. Neal*, 44 Tex. Civ. App. 412, 98 S. W. 417; *Linn v. Ziegler*, 68 Kan. 528, 75 Pac. 489.

DUNBAR, J.—August Schneider, upon whose life the beneficiary certificate herein sued upon was issued, disappeared from his home in the city of Spokane, July 7, 1898. On that date he was last seen by Mrs. Belle Bassett, his sister-in-law, standing at his front gate talking to a stranger. When Mrs. Bassett was passing out of the gate, Mr. Schneider called to her, saying that he was going to the mines to be gone for several days, and asked her to come over and take care of the house and to sprinkle the lawn while he was gone, and re-

quested her to say to his wife, who was visiting away from home, that he would return home on the following Wednesday. Mrs. Schneider with the children had been visiting her parents for some time, but was expected home within a few days. Mrs. Bassett testified that she was detained at the house, at the work which she was assigned to do, a little later than usual on that day, and that Mr. Schneider came home in company with the stranger above indicated, before she had finished her work; that they were standing at the gate talking when she passed out when the conversation between herself and Mr. Schneider took place. Mrs. Schneider testified that every effort was made to locate her husband, but to no avail. She communicated the fact of his disappearance to his lodge. The lodge took up the search, and a committee was appointed to see if he could be found, but with the same result. The committee caused an account of his strange disappearance, together with a description of the man, to be published in the "Forester," a journal conducted for the benefit of the order, and asked any of the brothers reading the same, if one should hear or learn of a person answering Schneider's description, to report the matter to the Spokane lodge. No tidings of him were ever received.

Mrs. Schneider continued to pay the dues on her husband's policy until February 28, 1900, when, being as she says satisfied that he was dead, she discontinued the same. Shortly after this date she desired to, and had an opportunity to, sell the real property belonging to herself and Mr. Schneider, but the purchaser was not satisfied with the title, and refused to accept the same. She consulted counsel, and was advised that seven years would have to elapse before she could get a decree of the court adjudging her husband dead, unless she could produce some direct evidence of his death at an earlier date. This being impossible, it was decided that the only way she could obtain a salable title to the land would be to obtain a decree of divorce from Schneider on the ground of desertion, and have the property set aside to her as her sepa-

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rate estate. Under this advice the divorce proceeding was instituted. In due time a decree was granted, decreeing to Mrs. Schneider all the real property that stood in Schneider's name before his disappearance.

In 1906, after the expiration of seven years, plaintiff commenced this action to recover upon the policy of insurance issued by the defendant, on the ground of the death of Schneider. The defendant answered, denying generally, and interposing an affirmative defense to the effect that, at the time of August Schneider's death, if he was presumed to be dead, he was not in good standing in the defendant order, his dues not having been paid until the end of the seven years. It is also affirmatively pleaded that the plaintiff was estopped by reason of her having brought her divorce action in April, 1900, and, for the purpose of her action, having regarded August Schneider as alive, she could not come into court in another and different action and contend that he was in fact dead at the time the former action was instituted. After the pleadings were at issue and before the trial, the defendant's attorney interposed a motion for judgment, urging as grounds therefor the alleged estoppel above set forth. This motion was denied, trial was had before a jury, and, after the introduction of plaintiff's testimony, defendant's attorney renewed his motion to dismiss on the grounds stated in the affirmative defenses; and after hearing argument of respective counsel, the court rendered decision, taking the case from the jury and dismissing same on the grounds of estoppel urged by defendant.

The main contention of the appellant here is that the court erred in refusing to allow the cause to go to the jury and dismissing the action, and in entering the judgment which followed said dismissal. It seems to be well settled that the presumption of death attaches when a party has been absent for seven years without tidings of his existence. There is some conflict in authority as to the time at which death is presumed to occur under such presumption; but the great

weight of authority is to the effect that that is a question of fact to be determined by the jury. In reaching a conclusion as to the time of death, much must necessarily depend upon the domestic attachment of the party. If it appears that the party had little regard for his family or friends, had no local attachments of any kind, was known to be on bad terms with his family or neglectful of it, or was in the habit of leaving his home for considerable periods of time without notifying his family or friends of his whereabouts, these circumstances would tend to diminish the presumption of death as the cause of the disappearance. But where the party is known to be sober and industrious, with strong domestic attachments, considerate, kind, and affectionate to his family, and generally regardful of the rights of others, and disappears suddenly from or leaves his home and the community in which he lives and where his interests are, without any explanation; these are circumstances so strong that, without more, the jury would be justified in concluding that death was the cause of his disappearance. This seems to be practically the case at bar, as shown by the testimony. It appears that Schneider was a man under middle age; that he had a wife and two children, a boy and a girl; that he was very strongly attached to his family; that no domestic infelicity had ever existed; that he was respected in the community; was in reasonably good circumstances, and that no possible cause could be assigned for his wilfully leaving his home under the circumstances which are assigned.

In laying down the rule of evidence Mr. Greenleaf, in his work on Evidence, vol. 1 (16th ed.), § 41, says:

"It is not necessary that the party be proved to be absent from the United States; it is sufficient, if it appears that he has been absent for seven years from the particular state of his residence without having been heard from. The presumption in such cases is, that the person is dead; but not that he died at the end of the seven years, nor at any other particular time. The time of the death is to be inferred by the jury from the circumstances."

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In 2 Wharton's Law of Evidence (3d ed.), § 1277, it is said:

" . . . ignorance, as to such person, after due inquiry, of all persons likely to know of him if he were alive; cessation of writing of letters, and of communications with relatives, in which case the inference rises or falls with the domestic attachments of the party. Thus, death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears."

In *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136, the court said:

"Any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity and objects in life, which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence."

The court then gives an instance of an honorable, upright citizen, who had enjoyed the confidence of his neighbors and his friends, was prosperous in business, rich in the affection of wife and children, who disappears and is never heard of afterwards. Says the court:

"Must seven years pass, or must it be shown that he was last seen or heard of in peril, before his death can be presumed? No greater wrong could be done to the character of the man than to account for his absence, even after the lapse of a few short months, upon the ground of a wanton abandonment of his family and friends."

And this, we think, is in accordance with the almost universal authority. This was the view taken by the trial court on this particular question, as shown from his remarks in granting the nonsuit. The court said:

"This case as far as the matter of the presumption of death is concerned, and whether it is necessary to overcome that presumption or to establish any presumption as to the time of his death, I think the case in the 26 Iowa presents a statement of facts almost parallel with those in this case, and that

the ruling of the court there was, that such circumstances could go to the jury and should be considered by them in determining whether the death occurred at the expiration of the period or as to when it did actually occur."

But the court indicated that, because the appellant had taken the position in the divorce proceeding that her husband was alive, she should now be estopped from denying that, and claiming that he died before the divorce action was commenced. The case was taken from the jury for that reason. On this proposition we are unable to agree with the learned trial court. The divorce action brought by her has nothing to do with determining the time of Schneider's death. Her opinion on that subject could not determine that question; and, as to the effect of that opinion on her, we do not think under the circumstances that it should work an estoppel. The action was brought under the advice of counsel, for the purpose of clearing her title. She was not certain as to his fate, but it should not estop her anyway, for she might have been honestly of the opinion at that time that he was probably alive. Necessarily it could have been nothing more than a probability, for she had not heard from him. And afterwards she might have received information which would cause her to change her mind in that respect, or further reflection without any further testimony might have wrought a change of opinion. So that this case, it seems to us, ought to be tried on the merits, and the truth elicited without regard to what was testified in any other case, which is really no evidence in this case. In addition to this, an estoppel must be mutual. There is nothing in this case to indicate that the respondent was in any way injured by the position taken by the appellant in the divorce proceeding, or that by reason of such position anything was done or neglected to be done by it which would in any manner prejudice it. It is fundamental that a party relying upon an estoppel must show that he has been prejudiced by the act of the party whom he is seeking to estop. Estoppels operate only towards par-

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ties or privies, and the party who pleads an estoppel must be one who has in good faith been led to his injury. 16 Cyc. 777.

Some definitions of estoppel are cited by the respondent, to the effect that, in the broad sense of the term, estoppel is a bar which precludes a person from denying the truth of a fact which has, in contemplation of law, become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais*. And further, "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." But while this is true of what an estoppel is, in the abstract, the party pleading it must show that he has been injured by reason of the acts of the party which he claims to be an estoppel, by reason of having relied on the representations of the person sought to be estopped, so that his position with reference to the matter in hand has been changed to his disadvantage. In this case it is not attempted to be shown in any way, and does not appear in any way, that the respondent was prejudiced by Mrs. Schneider's action in obtaining a divorce from her husband; and it is difficult to understand how it could be shown. The case which, it is said, the court relied upon, viz., *Potvin v. Denny Hotel Co.*, 37 Wash. 323, 79 Pac. 940, is not in point, because there the party complaining had relied upon Potvin's representations in the first instance, and had purchased the property by reason of said representations. But here nothing of the kind appears. If the fact existed that Schneider was dead at the time Mrs. Schneider ceased to pay his dues, that fact fixed the liability of the respondent, and it could not be modified or changed by any opinion expressed by Mrs. Schneider.

This question was directly passed upon in *Keels v. Mutual Reserve Fund Life Ass'n.*, 29 Fed. 198, where a woman had stated to the insurance company that the death of her husband had been caused by suicide, and afterwards claimed that

she had been mistaken, and that the real cause was accident, and not suicide. The court, in passing upon that question and upon some rules that had been laid down, viz., not that the mistake could not be corrected, but that the change of theory ought to have been submitted before the action to defend, said:

"This rule, however, seems to be very strict, and should not be applied to prevent the insurer from surprise or injury flowing from the acts of the plaintiff. The fact of death is communicated to the insurer. The question is made, did that death occur within the risks assumed? The proofs by the claimant are submitted early after the death, and on such information as can then be obtained. The insurer takes his own time. He examines the proofs, and makes his own investigation elsewhere,—gathers all the testimony he can. Is it just to deprive the claimant of any results favorable to him which such investigation may disclose? Suppose that the facts changing altogether the character of the death be discovered after action, or on the trial, in the unexpected disclosure by a witness under cross-examination, shall the claimant be deprived of this, and shall the jury be told to disregard it, and find against the truth?"

That was a good deal stronger case in favor of respondent than the case at bar, where no communication or representation whatever had been made to the insurance company, but such representation had been made only in a proceeding to which the insurance company was not a party.

Under the law and the equities of the case, we think the court erred in taking the case from the jury, and the judgment is therefore reversed, with instructions to proceed with the trial of the cause.

RUDKIN, C. J., CROW, FULLERTON, and GOSE, JJ., concur.

MOUNT, J. (dissenting).—To my mind important facts are omitted from the statement of the case made in the majority opinion. At the time the insured disappeared he left a deed transferring all his property to the name of his wife. He did not state to what mines, or with whom, he was going,

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although he had ample opportunity to do both. This is an action upon a contract of insurance. Before the appellant can recover, she must show that the insured is dead, and also that he died while the policy was in force. The policy was allowed to lapse after the insured had been gone for two years. It is the rule that a presumption of death follows after an absence of seven years, under certain conditions; but under the conditions shown in this case I do not think there can be any presumption that the insured died within the two years following his disappearance, or that he is now dead. He deliberately disappeared after making over all his property to his wife, and without making known to his relatives where or with whom he was going, and therefore under circumstances which show that in all probability he is still alive.

I think the judgment should be affirmed, and therefore dissent.

CHADWICK, J., concurs with MOUNT, J.

[No. 7785. Decided May 5, 1909.]

MALCOLM FENBY, *Appellant*, v. EVA I. HUNT,
Administratrix, Intervener and Respondent.¹

CHATTEL MORTGAGES—DESCRIPTION OF PROPERTY—RIGHTS OF CREDITORS—ACTUAL NOTICE. A prior creditor who has actual notice of a chattel mortgage given by the judgment debtor to a third person, cannot set up insufficiency of the description in the chattel mortgage, and claim priority on attaching the property.

SAME—RECORD—FILING—NECESSITY. Under Laws 1899, p. 157, § 6, it is not necessary to record a chattel mortgage where the debt secured is less than \$300, and filing in the auditor's office within ten days after execution is sufficient, under *Id.*, § 2.

SAME—FILING—TIME—EXECUTION. A chattel mortgage "dated" December 9th, but not delivered until December 13th, is not "executed" until the latter date, and is filed within ten days from "execution" if filed December 21st.

¹Reported in 101 Pac. 492.

SAME—PRIORITY—ATTACHMENT. A chattel mortgage filed within ten days of execution, takes priority over an attachment levied after execution of the mortgage.

USURY—PLEADING—DEFENSES. Usury to be available as a defense must be pleaded.

USURY—PERSONAL DEFENSE. The defense of usury is personal to the debtor and cannot be set up by a creditor to gain priority over other creditors.

CHATTEL MORTGAGES—FORECLOSURE—ATTORNEY'S FEES—AMOUNT. Where a note and chattel mortgage provided for the payment of "_____ dollars attorney's fees," it is not error to allow an attorney's fee in a sum admitted by opposite counsel at the trial to be a reasonable attorney's fee.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered June 6, 1908, upon findings in favor of the intervener, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Hurn & Curtiss, for appellant.

Birdseye & Smith, for respondent.

MORRIS, J.—On the 14th day of October, 1907, plaintiff sold to the defendant a team of horses, wagon and harness, for the sum of \$600. Defendant paid \$200 of this sum in cash, and executed a promissory note in the sum of \$400, due in four and one-half months, to secure the balance. On December 19, alleging that defendant had departed from the state with intent to defraud his creditors, plaintiff sought an attachment against the property of defendant, and on the same day the sheriff seized and took into his possession the property above mentioned. The property was subsequently sold under the writ, and the proceeds paid into court. On February 13, 1908, C. D. Hunt filed his complaint in intervention in the attachment suit, setting forth that, on December 13, 1907, to secure a loan of \$200, the defendant executed and delivered to him a promissory note, secured by a chattel mortgage upon the horses, wagon, and harness, seized

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by the sheriff under the attachment, and praying that the lien of his mortgage be held superior to plaintiff's attachment. Issue was joined upon this intervention, by the plaintiff, defendant having defaulted, and upon the hearing the court found in favor of the intervener, and plaintiff appeals. Subsequent to the appeal, intervener died, and the administratrix of his estate is here substituted as respondent.

Error is assigned, first, in that the description of the property in the mortgage is insufficient. Insufficiency or inadequacy of description in a chattel mortgage is an attack open to creditors, incumbrancers, and purchasers in good faith, whom it is sought to affect by reason of the constructive notice attaching to the recording or filing of the mortgage; but inasmuch as actual notice is of a higher character than constructive notice, one who has actual knowledge of the existence of the mortgage and of the property affected thereby cannot avail himself of any lack of sufficiency of description as could one to whom constructive notice alone was attributable. The creditor with actual knowledge of all the facts does not rely upon the public records to give him constructive notice of that which he already knows. In this case it appears, and the court so found, that appellant, prior to the issuance of his writ of attachment, knew of the mortgage to respondent and had, after the departure of the defendant, discussed with respondent what steps should be taken to protect the property described in the mortgage upon which both parties relied for the security of their respective claims against defendant.

It is next asserted that the mortgage is void as to appellant in that it was neither recorded nor filed within the time provided. The mortgage was dated December 9, delivered to respondent, together with the note it was given to secure, on December 13, and filed in the auditor's office December 21. The mortgage being given to secure a debt less than \$300, there was no necessity for its recording (Laws 1899,

page 157, chap. 98, § 6). The filing in the auditor's office "within ten days from the time of the execution thereof" (Laws 1899, page 157, chap. 98, § 2) was sufficient. Was the filing of this mortgage on December 21 within the time provided for? We think it was. The date of the mortgage, December 9, did not alone determine its "execution," as that word is understood and interpreted in statutes of a like character. The execution of a chattel mortgage means and includes the doing of those formal acts necessary to give the instrument validity as between the parties. There certainly could be no validity to a mortgage without a delivery and acceptance. One cannot be made a mortgagee unless there is some act on his part which can and does express his relation to the instrument. There must be a "meeting of the minds" in this sort of relation as in any other contract. Without these formalities there is no mortgage. Jones, Chattel Mortgages, p. 104.

The word "execute," when applied to a written instrument, unless the context indicates that it was used in a narrower sense, imports the delivery of such instrument. *Le Mesnager v. Hamilton*, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. 81. In *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439, 53 Am. St. 532, "execution" was held to include all acts essential to the completion of the instrument. A very similar case to the one before us will be found in *Hornbrook v. Hetzel*, 27 Ind. App. 79, 60 N. E. 965, the mortgage being dated June 25, but not delivered nor filed until August 4. The court says:

"Delivery was necessary to its execution. The statute requires that a chattel mortgage must be filed for record in the office of the recorder of the proper county within ten days after its execution. As there was no execution until its delivery, the mortgage was recorded in time."

For other cases in point see: *Solt v. Anderson*, 67 Neb. 103, 93 N. W. 205; *Arrington v. Arrington*, 122 Ala. 510, 26 South. 152; *Shaughnessey v. Lewis*, 130 Mass. 355; *Wells v. Lamb*, 19 Neb. 355.

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The mortgage, being filed within the time provided by law, became and was a lien upon the property described therein from the time of its execution on December 13, and was superior to appellant's attachment levied December 19. *McCarthy v. Seisler*, 130 Ind. 63, 29 N. E. 407; *Hanson v. Cochran*, 9 Del. 184, 31 Atl. 880; *Spencer Co. v. Papach*, 103 Iowa 513, 70 N. W. 748, 72 N. W. 665; *Way v. Braley*, 44 Mo. App. 457.

Error is next predicated upon a claim of usury, the loan by respondent to defendant being \$200, and the note and mortgage calling for a repayment of \$220, with interest. This can be of no avail to appellant for two reasons, first, he failed to plead usury, and this court has held, in two cases, *Brundage v. Burke*, 11 Wash. 679, 40 Pac. 343, and *Grubb v. Stewart*, 47 Wash. 103, 91 Pac. 562, that usury to be available as a defense must be pleaded; second, the defense of usury is personal to the debtor and his privies. *Webb, Usury*, §§ 363-368; *Bensley v. Homier*, 42 Wis. 631; *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S. W. 1006; *Pardoe v. Iowa State Nat. Bank*, 106 Iowa 345, 76 N. W. 800; *Adams v. Robertson*, 37 Ill. 45; *Pritchett v. Mitchell*, 17 Kan. 355, 22 Am. Rep. 287; *Mason v. Pierce*, 142 Ill. 331, 31 N. E. 503.

The remaining error is based upon the inclusion by the court of an attorney fee to appellant in the sum of \$75. The note and mortgage both provided for the payment of ——— dollars attorney's fee. During the examination of intervener the record shows the following:

"Mr. Birdseye: Your Honor, we allege here that \$75 is a reasonable attorney's fee as provided in the mortgage for its foreclosure. Do you desire proof upon that? I am willing to submit that to the court or ask Mr. Curtiss' opinion. Mr. Curtiss: Why, I think that is all right. I think I would want that kind of a fee myself if I foreclosed the mortgage. I am willing to admit that is a reasonable fee."

This would seem to dispose of this assignment, and we do

not care to add more than that the allowance of attorney's fees under the above circumstances was not error.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, CROW, MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 7534. Decided May 6, 1909.]

J. S. BROWN & BROS. MERCANTILE COMPANY,
Respondent, v. W. H. SHERROD *et al.*,
Appellants.¹

EVIDENCE—WEIGHT AND SUFFICIENCY. The undisputed testimony of an interested party is not conclusive or binding upon the court.

APPEAL—REVIEW—FINDINGS. Findings will not be disturbed because contrary to the undisputed evidence of an interested party where the same was not reasonable or in harmony with established facts, and the trial judge had opportunity to pass upon his credibility.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 7, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Totten & Rozema, for appellants.

Leopold M. Stern, for respondent.

Crow, J.—This action was commenced by J. S. Brown & Bros. Mercantile Company, a corporation, against W. H. Sherrod and Mildred Sherrod, to recover on a promissory note. From a judgment in favor of the plaintiff, the defendants have appealed.

There is no material dispute on any questions of law, although some are discussed in the briefs. The controlling

¹Reported in 101 Pac. 481.

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Opinion Per Crow, J.

assignment of error is that the findings are not sustained by the evidence, but we conclude they are sustained by its clear preponderance. The note was originally executed in Colorado by The W. H. Sherrod Mercantile Company, a corporation, was payable one day after date, and was indorsed by the appellants W. H. Sherrod and Mildred Sherrod. The respondent alleged, and introduced evidence to show, that it was executed by the maker for the accommodation of appellants, who were then residents of the state of Colorado, officers of, and owners of the capital stock of, The W. H. Sherrod Mercantile Company; that they indorsed their names on the note at the time of its execution as a part of the same transaction, and before its delivery; that each of them knew and understood the note would not be paid at maturity; that they agreed it should not be presented to the maker for payment when due; that immediately after its execution they left the state of Colorado; that as soon as possible respondent, exercising due diligence, notified appellants that the note had not been paid; that thereafter each of them in writing notified respondent it would be paid by the appellant W. H. Sherrod; that under the laws of Colorado introduced in evidence, notice of dishonor to appellants as indorsers was unnecessary, and that they were not discharged from liability.

Appellants insisted that they were only indorsers for The W. H. Sherrod Mercantile Company; that they indorsed the note on the day of its execution but after its delivery; that it was not executed and delivered for their accommodation; that under the laws of Colorado they were entitled to notice of dishonor, and that they had been discharged from liability for the want of such notice. Their principal argument is that the trial court should have accepted and credited the evidence of W. H. Sherrod, which they claim was undisputed and in which he testified to his version of the actual transaction between the parties. He was a party directly interested in the result of this action. Courts and juries are not compelled to accept the undisputed testimony of an interested

party if it does not appear to be credible. *Coey v. Darknell*, 25 Wash. 518, 65 Pac. 760; *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884.

In *Gosline v. Dryfoos*, 45 Wash. 396, 399, 88 Pac. 634, we said:

"It is a well-established principle of law that neither courts nor jurors are bound by the uncontradicted testimony of an interested party when such testimony, upon being carefully weighed, does not commend itself as worthy of belief. If by reason of improbable and inconsistent statements, the testimony of an interested party appears to be lacking in the element of truthfulness, courts and jurors may, in their discretion, reject the same. This is undoubtedly what the trial court did in weighing the appellant's sworn statement, and its right to so proceed has been recognized by this court."

The evidence mentioned does not impress us as reasonable or credible. It is not consistent or in harmony with established and admitted facts and circumstances pertaining to the execution of the note and surrounding the parties. The trial court saw the appellant, heard him testify, was in a position to pass upon his credibility, and evidently rejected his statements as unworthy of belief.

We find nothing in the record to justify us in disturbing the findings. The judgment is affirmed.

MOUNT, PARKER, DUNBAR, and CHADWICK, JJ., concur.

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Opinion Per MOUNT, J.

[No. 7493. Decided May 11, 1909.]

ISADORE LEASER, *Appellant*, v. JOHN LEASER, *Respondent*.¹

DIVORCE—DECREE—DIVISION OF PROPERTY. In granting a divorce and making a division of real estate, it is immaterial whether the only property of the parties was separate estate of the husband.

SAME. In granting a divorce to a wife on the ground of cruelty, leaving her with five minor children to support (four by a former marriage) it is an abuse of discretion to award her but \$350 out of property of the value of \$1,600, and ten dollars per month for the support of an infant child, where her husband was an able-bodied man earning from \$3.50 to \$5 per day eleven months in the year; and the decree will be modified on appeal so as to award her the whole of the property.

Appeal by plaintiff from a judgment of the superior court for Spokane county, Kennan, J., entered March 9, 1908, directing the payment of alimony awarded by a decree of divorce, after a trial on the merits before the court. Modified.

Charles Grant and Joseph Rosslow, for appellant.

Scott & Campbell, for respondent.

MOUNT, J.—The appellant brought this action to obtain a divorce from the respondent. After issues were joined and a trial had, the lower court granted the plaintiff a divorce from the defendant upon the ground of cruelty. She was awarded the care and custody of an infant child. She was also awarded the sum of \$350, which was made a lien upon lots 4 and 5, of block 15, of resurvey of Second addition to Third addition to Railroad addition to Spokane, in Spokane county. This was the only property owned by the parties to the action. The defendant was also required to pay \$10 per month for the support of the infant child. The plaintiff has appealed from that part of the decree awarding her \$350 and \$10 per month.

¹Reported in 101 Pac. 705.

The lots above mentioned, with the improvements, were worth at the time of the trial about \$2,500. They were incumbered by a mortgage of \$900. The parties own no other property. The appellant at that time was forty-three years of age. She had four minor children by a former marriage, and one child three years of age by the respondent. She has no means of earning a livelihood except by the work of her hands. The respondent is a strong, able-bodied man, a carpenter and brick mason by occupation, and capable of earning from three and one-half to five dollars a day, and worked on an average about eleven months in the year. There is some contention in the case whether the real property above described is or is not the separate property of the respondent. This question may be dismissed without consideration, because the statute provides that the court shall make such disposition of the property of the parties as shall appear just and equitable, having regard to the merits of the respective parties, and we have held that there is no distinction between separate and community property in this regard. *Claiborne v. Claiborne*, 47 Wash. 200, 91 Pac. 763; *Ramsdell v. Ramsdell*, 47 Wash. 444, 92 Pac. 278.

In this case the trial court found that the appellant was entitled to a decree of divorce because of cruelty of the husband, and that she should have the care and custody of the infant child. This left the appellant with five minor children, four by a former marriage and one by the respondent. In view of these facts and the further fact that the respondent was an able-bodied man, earning from three and one-half to five dollars per day, for eleven months in the year, and in view of the fact that the real property was worth only about \$1,600 net, we think the trial court should have awarded the whole of this property to the appellant, and abused its discretion by not doing so.

The cause is therefore remanded to the trial court, with directions to modify the decree so as to award the whole of

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Opinion Per DUNBAR, J.

the real property to the appellant, subject to the mortgage of \$900; appellant to recover her costs.

RUDKIN, C. J., DUNBAR, CHADWICK, and FULLERTON, JJ., concur.

CROW, GOSE, MORRIS, and PARKER, JJ., took no part.

[No. 7697. Decided May 11, 1909.]

FRITZ PREAS, *Respondent*, v. THOMAS W. VOLLINTINE,
Appellant.¹

BILLS AND NOTES—DISHONORED DRAFT—DEFENSES—WANT OF CONSIDERATION—EVIDENCE—TO VARY WRITING. It is a good defense to an action upon a dishonored draft, brought by the drawee against the drawer, that plaintiff had falsely represented to defendant that the proceeds of certain mining claims in which the parties had been interested and which now belonged to plaintiff had been deposited in bank to the credit of the defendant, and that defendant, relying thereon, and as an accommodation to plaintiff, had, without consideration, drawn the draft on the bank to enable plaintiff to draw down the funds; and evidence of such fact does not vary the written instrument, but is admissible to show want of consideration, within Laws 1899, p. 340, § 28, making the same a matter of defense.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 18, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a draft. Reversed.

Shank & Smith, for appellant.

John P. Hartman and *F. C. Kapp*, for respondent.

DUNBAR, J.—Plaintiff brought this action against the defendant as drawer, upon the following dishonored draft:

“The Scandinavian American Bank of Seattle.

“Seattle, Washington, Aug. 11, 1906.

“\$698.00 At sight pay to the order of Fritz Preas six hundred ninety-eight and 00-100 dollars value received and charge the same to account of Thomas W. Vollintine.

To the Miners & Merchants Bank of Alaska. Nome, Alaska.”

¹Reported in 101 Pac. 706.

The plaintiff alleged the drawing of the draft, the presentation, the dishonor of the draft, protest, and notice to the drawer. The answer denied consideration, denied protest and notice; affirmatively alleged that, prior to the date of the draft set out in the complaint, plaintiff and defendant were mutually interested in divers mining claims in Alaska; that as a compromise adjustment of plaintiff's claim, the parties on August 9, 1906, executed a written agreement, in which defendant released and relinquished to plaintiff all right, interest, or claim in and to said mining claims (a copy of this agreement is made a part of the answer); that prior to the date of said settlement, plaintiff and defendant had, at plaintiff's suggestion, placed for sale said mining claims in the hands of an agent in Alaska selected by plaintiff; and after said compromise settlement, the defendant was informed by plaintiff that said agent had sold a part of said claims, and had placed in the Miners & Merchants Bank of Alaska, for defendant, as his share of the proceeds of said sale, the sum of \$698; that the defendant had no knowledge of said sale and any proceeds and disposition thereof other than the statement of plaintiff; that it was thereupon mutually agreed orally between the plaintiff and defendant, that defendant's share of any proceeds of claims should go to plaintiff, along with the defendant's interest unsold, under the terms of said settlement, and in pursuance of said arrangement and for the sole and only purpose of relinquishing any claims of defendant to plaintiff, and collecting for plaintiff's accommodation the money, if any, deposited for defendant, the draft was signed by defendant. The affirmative matters in the answer were denied by reply. The cause was tried to the court, and it found as facts the principal allegations of the complaint, the drawing of the draft, the presentation and dishonor of the draft, the refusal of the defendant to make good the draft, etc.; and further found that the plaintiff was entitled to a judgment against defendant in the sum claimed, and judgment was entered therefor.

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These findings are excepted to by the appellant. The court took the view that the affirmative defense as pleaded did not show want of consideration, but finally admitted some testimony bearing on that question, but refused to allow the appellant to prove under what circumstances the draft was made and the cause of its execution. For the purpose of sustaining the allegations of the affirmative defense, an attempt was made to show that the draft was drawn for the purpose of obtaining the proceeds of the sale of the mining claims in Alaska, which were claimed by the respondent in this case under a former agreement between him and the appellant, and which were conceded to him by the appellant. This testimony was objected to, and the objection sustained. Also the testimony of Mrs. McGill, to the effect that Preas told her that Preston, his agent in Alaska, said that some of these mining claims that he had staked in Mr. Vollintine's name had been sold and the money deposited in Vollintine's name in the Alaska bank. This testimony was stricken out on the motion of the respondent. The testimony offered and refused was no broader than the allegations of the affirmative answer, so that the question determined by the court may be determined here upon the pleadings.

It is the contention of the respondent that paragraph 3 of the affirmative answer, which alleges in brief that, prior to the date of the settlement pleaded, the respondent had notified the appellant that certain of these claims in Alaska had been sold and the money deposited for him there, and that as a matter of accommodation this certificate had been executed and given to the respondent so that he could obtain funds which had been deposited, according to his statement, for the appellant, and which funds it was conceded the appellant was entitled to, is an attempt to vary the terms of a written contract. But we are unable to see that there is any attempt here whatever to vary the terms of the contract sued upon, viz., the draft. The contract and its terms are conceded. But the attempt is simply to explain circumstances

which, if true, would work a want of consideration; and as between the original contractors, this, it seems to us, was a proper allegation and would sustain proper proof. Pierce's Code, § 6596 (Laws 1899, p. 340, § 28), provides that:

"Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto* . . ."

And in *Johnson County Sav. Bank v. Rapp*, 47 Wash. 30, 91 Pac. 382, this question was directly decided by this court. Said the court:

"It is next assigned that the court erred in admitting, over the objection of appellant, evidence relating to the representations of the traveling salesman of the Puritan Manufacturing Company. But this was a necessary part of the respondent's case. They were obligated to show the condition on which they purchased the goods in order to show a failure of consideration. This evidence was directly in point for that purpose. The written order which the appellant urges represents the entire contract was at best obscure, and subject to interpretation. The interpretation put thereon by the salesman to induce a sale could be properly put in evidence to show a failure of consideration. The testimony of the witness Hoyt as to a similar transaction with the appellant bank was admissible as tending to show knowledge on the part of the bank of the character of the paper they were purchasing from the Puritan Manufacturing Company."

So this allegation in the answer, and the testimony to support it, is a necessary part of the respondent's case, and was directly in point for that purpose; and, as stated in the last proposition just cited, it was also admissible as tending to show knowledge on the part of the respondent in this case of the character of the paper which he received and the extent to which the drawer would be bound by it. It would certainly be exceedingly unjust if the facts set forth in the affirmative defense are true, where representations were made by a party that certain funds are on deposit in a bank for that party and the draft is there for the benefit of the party making the statement, no funds being there, to hold the

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drawer responsible to the party who was responsible for the wrongful issuance of the draft.

With this view of the law, the whole question in this case becomes a question of fact, viz., whether the draft was issued under the circumstances and for the reason alleged by the appellant, or whether it was issued in accordance with the testimony of the respondent. We have examined this testimony with care. It is very brief, and while the burden is upon the drawer of the draft to overcome the presumption established by the execution of the draft, it seems to us, notwithstanding the findings made by the honorable judge who tried the case, that that presumption has been clearly overcome in this case. Even on the testimony which the court permitted, this case would have to be reversed, in any event, for the error of the court in refusing the testimony which we have mentioned above. But under the testimony which was admitted, we are satisfied that the testimony of the respondent is not reasonable. Under this contract, which was entered into on August 9, he was entitled to the proceeds of these claims which stood in the name of the respondent. He admits that, shortly after the contract was entered into, he told the appellant that he had been informed by his agent that these claims had been sold, and that the money was deposited in the bank for the appellant. His testimony on other material points is contradicted flatly by the appellant, whose testimony, it seems to us, is reasonable and bears the impress of truth. It is also contradicted by the testimony of Mabel McGill, who stated that she had had a conversation with the respondent, Mr. Preas, who told her that, under the written agreement, he was entitled to those mining claims, referring to the mining claims in Alaska, and was, therefore, entitled to any proceeds that might be derived from them, and that the draft was made for the purpose of obtaining those proceeds. This testimony was objected to and the objection sustained, but it appears in the record and, for the purposes of this case, will be considered here. He admitted

that he had told the appellant that the money was there, and in explanation of that said "that he only had the agent's word for it, but he had confidence in the agent and that if he said it was there, he was sure it was there;" that he did not know that it was in her father's name, but he supposed it was; it was only reasonable to suppose it was in her father's name. When asked the question, "What did he say when you said that all Mr. Vollintine knew was what Mr. Preas told him?" she answered, "He admitted that that was the case." The witness was a daughter of the respondent in this case, but her testimony seems straightforward and reasonable, and was unshaken by cross-examination. Considering all the testimony in the case, we are forced to the conviction that the draft was given merely as a matter of accommodation to the respondent by reason of representations made by the respondent, which representations were not true; that there was, therefore, no consideration whatever for the draft, and the judgment will therefore be reversed with instructions to dismiss the action.

RUDKIN, C. J., FULLERTON, CROW, and MOUNT, JJ.,
concur.

[No. 7777. Decided May 11, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. W. G. JONES,
Appellant.¹

WITNESSES—CROSS-EXAMINATION—CONVICTS—TRUE NAME OF WITNESSES—MATERIALITY. Upon cross-examination of a state's witness, who had been convicted as a participant in the crime under an assumed name and admitted perjury on his own trial, his true name is not material to the issue, and it is not an abuse of discretion to refuse to require him to state it, where accused had the full benefit of cross-examination.

LARCENY—MONEY—EVIDENCE—SUFFICIENCY. A conviction of larceny of United States money is sustained where a witness stated that he was familiar with United States money, that it was United

¹Reported in 101 Pac. 708.

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Opinion Per CHADWICK, J.

States currency, and looked like United States money, and described the denomination of the bills, although in an isolated answer on cross-examination he admitted it might have been Canadian money.

CRIMINAL LAW—TESTIMONY OF ACCOMPLICES—INSTRUCTIONS. It is not error in giving a correct instruction cautioning the jury against convicting upon the uncorroborated testimony of an accomplice, to refuse to instruct that in most cases the same is clearly insufficient and that the jury cannot convict thereon if the accomplice has testified differently at some other time.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered May 5, 1908, upon a trial and conviction of the crime of grand larceny. Affirmed.

Pruyn & Felkner, for appellant.

C. R. Hovey and *H. W. Hale*, for respondent.

CHADWICK, J.—Appellant was convicted of the crime of grand larceny. One Judd Wilson had already been convicted of the same offense, and sentenced to the penitentiary. He was brought from the penitentiary and sworn as a witness for the state at the trial. When upon the witness stand, he was asked on cross-examination to give his true name, after he had admitted that "Judd Wilson" was an assumed name. An objection to this question was sustained; this is assigned as error.

No authorities are cited by counsel that in any way aid us in the determination of this question, nor have we been able to find any. It would seem, however, that it can be determined by reference to general principles. The conviction of appellant must depend upon the proof of certain physical facts to which the witness Wilson and other witnesses have testified. The name of the witness could not be material to prove or disprove any fact upon which conviction depends. It was at best collateral to the main inquiry, and, if material at all, could only go to the credibility of the witness. Its materiality and importance, though urged by counsel, are not pointed out. In order to reverse the case for this reason, we would have to presume prejudice resulting to ap-

pellant from the mere fact that the true name of the witness was not disclosed. This we cannot do. Appellant had the full benefit of cross-examination. He showed that the witness was a convict; that he had been living under an assumed name; that he had by his own admission confessed his perjury when testifying in his own behalf when tried for the same offense. Disclosure of his true name would have been of no benefit to the jury, and it was not an abuse of discretion on the part of the trial court to thus limit the cross-examination.

Appellant was charged with the theft of lawful money of the United States, whereas, on cross-examination, the prosecuting witness admitted that the money stolen might have been Canadian money. It is insisted that this brings this case within the rule of *State v. Phillips*, 27 Wash. 364, 67 Pac. 608. In that case it is said:

"The record has been carefully examined, and no further or more specific description of the money contained in the packages stolen can be gathered from the testimony."

It is not so here. Both on cross-examination and redirect examination the witness testified that he was familiar with "United States money," and that "it was United States currency," and that "it looked like United States money." He also described the several denominations of the bills alleged to have been stolen. The weight to be given to this evidence was for the jury, and their findings cannot be disturbed by isolating one question and answer from the whole examination, or because the testimony on the whole was without qualification. *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Hill*, 45 Wash. 694, 89 Pac. 160.

The next error complained of is the refusal of the court to give the following instruction:

"The witness Judd Wilson, who has testified in this case, is an accomplice and an accomplice is one who is associated with others in the commission of crime, all being principals. Wilson has testified that he was associated with the defendant in stealing money mentioned in the information, and that, in law, would make him an accomplice. The court in-

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structs you that the testimony of an accomplice comes from a polluted source and that while the rule of law is, that a defendant may be convicted on the uncorroborated testimony of an accomplice, where the honest judgment is satisfied beyond a doubt, still a jury should act upon such testimony with great care and caution and subject it to careful examination in the light of other evidence in the case, and the jury should not convict upon such testimony alone unless, after careful examination of it, they are satisfied beyond all reasonable doubt of its truth. *In many, if not in most cases, the evidence of an accomplice, uncorroborated in material matters will not satisfy the honest judgment beyond a reasonable doubt, and it is clearly insufficient to authorize a verdict of guilty. Where an accomplice has been impeached by showing that he has testified differently at some other time with reference to the facts in issue, then in such a case the jury cannot convict upon his uncorroborated testimony. And if you find that the witness Judd Wilson has testified concerning the facts in issue in this case differently at another time from his testimony in this case, then you cannot find the defendant guilty upon his uncorroborated testimony.* The corroboration that the law requires for the testimony of an accomplice ought to be sufficient to satisfy the jury of the truth of the accomplice's testimony, and the corroboration must be as to some fact connecting the defendant with the commission of the offense, and it is not sufficient if it merely shows the offense was committed and the circumstances thereof."

The court gave the instruction as requested, omitting the part we have italicized. It is said:

"The instruction asked for was approved by our court in *State v. Pearson*, 37 Wash. 405, 79 Pac. 985, and the case was reversed and sent back for a new trial because the requested instruction was not given."

It is true that the words stricken from the requested instruction were contained in the instruction quoted in the *Pearson* case, but we did not there hold that the instruction requested contained a statement of a hard and fast rule of law, nor did we approve the form of it. The real question before the court was whether a conviction could be had on the

uncorroborated testimony of an accomplice, and whether any instruction upon that subject had been given. We held that no such instruction had been given, and that the instruction requested, or one substantially in that form, should have been given. The instruction complained of states the law, and when this appears, this court will not compare the instruction given by the court with a requested instruction on the same subject, for the form of the instruction has been repeatedly held by us to be immaterial. This is elementary, and needs no citation of authority.

Finally, it is urged that the court erred in overruling appellant's motion for a new trial. The only ground for a new trial not already discussed is that the evidence is insufficient to sustain the verdict. We have read the record and find abundant evidence, if believed by the jury, to sustain the conviction.

Finding no reversible error in the record, the judgment of the lower court is affirmed.

RUDKIN, C. J., CROW, PARKER, FULLERTON, GOSE, and DUNBAR, JJ., concur.

[No. 7518. Decided May 12, 1909.]

ELIAS LARSEN, *Respondent*, v. COVINGTON LUMBER
COMPANY, *Appellant*.¹

MASTER AND SERVANT—VICE PRINCIPALS—EVIDENCE—CONCLUSION OF WITNESS. The statement by plaintiff and his expert witness that in their opinion a head sawyer in a mill was in full charge of all the workmen, negatived by the facts detailed, is a mere conclusion and of no probative force.

SAME—FELLOW SERVANTS—HEAD SAWYER AND TALLYMAN. The head sawyer in a mill (the sawyer in charge of the "head" saw) is not a vice principal as to a tallyman, marking the lumber after it had been cut, who was not in the sawyer's crew and over whom the sawyer had no control in the performance of his duties.

¹Reported in 101 Pac. 717.

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Opinion Per Crow, J.

SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. A tallyman, marking lumber near the rolls as it came from the head saw, who was injured when a log from the saw struck a cant that was being returned from a cut-off saw to be transferred to another section of rolls, is guilty of contributory negligence, where it appears that he was facing the log and saw it thirty seconds before it would strike the cant, that he took hold of the cant to throw it on to the other set of rolls, needlessly assuming the risk of removing the cant in reliance upon his ability to do so in time, when he had several avenues of escape and ample time to get out of the way.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 4, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Reversed.

Graves, Palmer & Murphy and *Charles H. Winders*, for appellant.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondent.

Crow, J.—Action by Elias Larsen against the Covington Lumber Company, a corporation, to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, the defendant appeals.

We will only consider appellant's contention that the trial court erred in denying its challenge to the evidence, and its motion for a directed verdict. Appellant owns and operates a sawmill in King county, in which the respondent, at the time of his injury, was employed as marker or tallyman. Numerous acts of negligence were pleaded, but they were all abandoned on the trial except the alleged negligence of one Charles Crawford, who was the appellant's head sawyer and who was so designated, not because his position was necessarily superior to other employees, but because he was in charge of and operated the saws known as head saws. The mill was operated from west to east. Logs were brought to the deck, transferred to the carriage, were cut by the head saws, and thence the lumber passed to the rolls, the edger, and cut-off saws,

to be cut into desired widths and lengths. At the head or west end of the mill were two large circular head saws, one above the other. To their immediate right and south was the carriage way upon which the log carriage moved east and west. The carriage would be brought to the west, and loaded with a log, which was fastened thereon by a workman known as the "dogger," and adjusted to the cut by another workman known as the "setter," both of whom acted in obedience to signals given by the head sawyer. The sawyer then caused the carriage to move eastward until the saws engaged the log throughout its entire length, when he caused the carriage to move backward for a resetting of the log, preparatory to another cut. The pieces thus cut from the logs passed eastward to other operatives. The head saws rested on a large frame, immediately over which a screen was suspended to protect the sawyer from dust and splinters. In front of the frame, and to the left or north of the carriage way, was a system of live rolls, known as "section No. 1," twenty-six and one-half inches high, and extending easterly about forty-eight feet. These rolls were controlled by a lever in charge of the offbearer, who stood at their west end. When a clear piece of lumber was cut from a log it dropped on this first section of rolls and then, by a system of transfers, also operated by the offbearer, was transferred towards the north to other rolls immediately in front of the edger saw, and thence by the edgerman into the edger itself, to be cut into desired widths. The lumber was then transferred from the edger to the respondent as tallyman, who marked it, and it then passed to the cut-off saw to be cut into the lengths indicated by him.

In the same line with the first section of live rolls was a second section, separated therefrom by a passageway about twenty-one inches wide, and then extending east about thirty-two feet to the cut-off saw, which was about eighty feet from the head saws. The respondent's position was along the second section of the rolls, near the edger and slightly to the east of the first section. The second section of rolls was con-

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trolled and operated by a lever located at its eastern end, in charge of the cut-off sawyer. The respondent as marker, however, could by signals direct the cut-off sawyer in its operation when it became proper or necessary for him to do so. He marked and tallied the lengths into which the cut-off sawyer was to cut the lumber passed to him. If the cut from a log was a slab, it at once passed over both sections of rolls to the cut-off sawyer who cut it into wood, and sent it out of the mill through a conveyor. If the cut from the log was all clear lumber, it was at once transferred to the rolls in front of the edger, thence through the edger, past the respondent, was marked by him, and thence sent to the cut-off saw. If the cut from the log was part clear lumber and part slab, it was at once sent over both sections to the cut-off sawyer, who cut the slab part into wood and, when he had a favorable opportunity, sent the good piece or cant back over the second section of rolls, which he reversed for that purpose, and on to the first section, to be thence transferred to the rolls in front of the edger.

It was during the performance of this last-mentioned work that the respondent was injured. The head sawyer had cut from the log a piece of partly slab and partly good lumber, which was sent over both sections to the cut-off sawyer, who cut the slab into wood. He then looked towards the head sawyer and, having seen that he was giving a signal to the setter, reversed the second section of rolls and returned the cant to the first section. The cant was about fourteen feet in length and ten to fourteen inches in width, and the respondent took hold of it with his hands to assist in transferring it to the rolls in front of the edger. Either through his efforts or in some other manner, it assumed an angular position across the east end of the first section of rolls, and came in contact with the log on the advancing saw carriage, which pushed it and the respondent against the edger and severely injured him.

All of the above facts are shown by undisputed evidence.

The respondent contends that the head sawyer was negligent in running the log and carriage against the cant, and in not stopping the carriage until the cant could be transferred to the edger rolls. The evidence further shows that the log was about fifty inches in diameter at its larger end, and fifty feet in length; that it required one minute to saw its entire length; that three sets of saws, the head saws, the edger saws, and the cut-off saw, were operated by different employees; that the head sawyer, the edgerman, and the respondent as marker, each had written orders from the superintendent of the mill, detailing the sizes and quantity of lumber to be cut, and directing their work; and that these written orders gave information to the head sawyer as to the thickness of his cuts, to the edgerman as to the width of his, and to the respondent, as to the lengths he was to mark.

Respondent contends (1) that it was the head sawyer's duty to maintain a constant watch along both sections of rolls, and see that they were clear before moving the carriage; that if he had done so he could have stopped the carriage before the log struck the cant, and that his failure to do so was negligence; (2) that he was the vice principal of the appellant in general charge of the saws, rolls, and men, and that his negligence was therefore the negligence of the master. The appellant contends (1) that the head sawyer's duties were not those claimed by respondent; (2) that he was not negligent; (3) that he was not a vice principal, but was respondent's fellow servant; and (4) that respondent was guilty of contributory negligence.

We think appellant's contentions are all sustained by undisputed evidence. There is no competent evidence showing or tending to show that the head sawyer was authorized to give orders to the respondent, or to any of the workmen other than the dogger and setter, or that he had any control over them. We do not overlook the fact that the respondent himself and one Calderwood, an alleged expert, who had never worked in the mill, in substance testified that, in their opinion,

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Crawford, as head sawyer, was in full charge of the workmen. Respondent's testimony on this point was only the statement of his conclusions and opinion, or an effort upon his part to invade the province of the jury, and determine the ultimate facts which they were to find. The elementary facts detailed by him and his general evidence negative the conclusion which he attempted to draw, the statement of which was elicited by leading and suggestive questions ingeniously propounded by his counsel and permitted over appellant's vigorous objections. The evidence of Calderwood was improperly admitted over appellant's objection, being incompetent, not the statement of any fact, and having no probative force or value.

Our conclusion, from the undisputed and competent evidence, is that the head sawyer was not appellant's vice principal, but respondent's fellow servant; that he was not negligent, and that, even though he had been negligent, appellant would not be liable, there being no contention that the sawyer was incompetent. Respondent was an experienced man. He had worked in the mill for six months, and was familiar with his duties and the entire situation. He testified that, shortly after he commenced work, the head sawyer on one occasion signalled him to remove a cant from the live rolls, and delayed moving the carriage until he did so; that respondent moved the cant, and that thereafter he understood and discharged his duties in that regard without further instruction, always relying upon the head sawyer to withhold the carriage until the rolls were clear. There is no evidence that it was the duty of the head sawyer to give any such direction or signal to the respondent, or that he did so on any occasion other than the one mentioned. The mere fact that, in a single instance, he volunteered to give such a direction or suggestion does not sustain respondent's contention that it was either his duty or his custom to do so.

Contending that the head sawyer was a vice principal, the respondent cites: *O'Brien v. Page Lumber Co.*, 89 Wash.

537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326; *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645, 90 Pac. 1046; *Ball v. Peterman Mfg. Co.*, 47 Wash. 653, 92 Pac. 425. In these cases it was held that the head sawyer was a vice principal; but in each of them the injured party was an employee who was under his immediate direction and control. The doctrine of these cases is not that the head sawyer, because of his position as such, would necessarily and always be a superior officer to all other employees in the mill; but that he, in the instances then under consideration, became a vice principal because he had the direction and control of the men immediately assisting him in his part of the work, because he had authority to send them into hazardous situations, and to place them where they did not know of dangerous agencies which he was about to use, and which he did use without warning them, while they were in such positions. No such condition exists in this case. In the *O'Brien* case, where the dogger was injured, this court recognized the doctrine that, although as to co-employees when performing duties such as those we have mentioned, the sawyer was a vice principal, yet that he might, in the discharge of other duties, be their fellow servant, using the following language:

"In some respects, the sawyer was a fellow servant with the appellant. It required the labor of both to place the logs upon the saw carriage. The appellant attached the log firmly to the carriage so that it might be passed through the saw by the sawyer. The appellant loosened the logs from the carriage so that the sawyer might turn them at the proper time. In these respects, they were fellow servants, working together, each having his particular duties in the common employment of converting logs into lumber."

In the case at bar the head sawyer had no control over the respondent, in the performance of his duties. As to him, he was a fellow servant, engaged in the common employment of manufacturing lumber.

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The evidence in this case further convinces us that, as a matter of law, the respondent was guilty of contributory negligence to such an extent as to preclude him from recovering. When he took hold of the cant, he was facing the saw carriage and log. He testified that the saw had then cut into the log only about six feet. The undisputed evidence shows that the log moved about one foot per second of time. The cant was not over fourteen feet in length. Respondent was at the east end of the first section of live rolls, about forty-eight feet from the head saw. The west end of the cant was at least thirty feet from the log. It would require about thirty seconds for the log to advance that distance. All the evidence, other than that of respondent, was that he himself threw the cant diagonally across the rolls, immediately in front of the approaching log. But, accepting his statement to the contrary, he was in a more favorable position to see and watch the approaching carriage than the head Sawyer was to watch him and the cant upon the rolls. Respondent had ample time to escape by retreating to the east of the edger, or through the open passageway between the first and second sections of rolls, or down the passageway towards the cut-off Sawyer. It is true that he contends these avenues of escape were closed by certain appliances and accumulated lumber. This statement is not only contradicted by all the other witnesses, but cannot be true in the light of the surrounding physical conditions as detailed by respondent and shown by the undisputed testimony of other witnesses. It is either a fact that the passageway between the two sections of live rolls was unobstructed, or that the distance between the west end of the cant and the moving log was much greater than he testified, which latter condition would have afforded him ample time to move the cant.

We have before us a complete map of the mill, made upon an exact scale, and introduced in evidence by the respondent himself. We also have a model of the mill, showing the relative location of all machinery and appliances pertinent to a

careful consideration of this case. The undisputed situation and conditions thus shown compel us to hold the respondent did have ample means of escape. It is manifest from all the testimony that he himself was either reckless or careless, that he needlessly assumed the risk of removing the cant, which he says was in a dangerous position, and that he did so in the face of the approaching carriage, evidently relying upon his ability to so move it before it could be struck by the log. He had every opportunity for observing the danger which threatened him, but failed to get out of the way, although able to do so. We are compelled to hold, under the undisputed evidence, that he was guilty of contributory negligence as a matter of law. It is true that he has been most seriously injured. But this unfortunate fact, coupled with the further fact that he was in appellant's mill, is not of itself sufficient to entitle him to recover. It is necessary that he should show some negligence of the appellant, which he has not done.

The appellant's motion and challenge to the evidence should have been sustained. The judgment is reversed, and the cause remanded with instructions to dismiss the action.

RUDKIN, C. J., FULLERTON, CHADWICK, GOSE, PARKER, MORRIS, and MOUNT, JJ., concur.

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[No. 7447. Decided May 13, 1909.]

FRED N. PATTERSON, *Respondent*, v. WENATCHEE CANNING
COMPANY, *Appellant*.¹

WAREHOUSEMEN—BAILMENT—CONSTRUCTION OF CONTRACT—TRIAL—QUESTION OF LAW. Under an agreement reciting that the defendant rented to the plaintiff a certain cold storage room to be used for storing beef, for a certain sum per month or in proportion to space used, the relationship of the parties is that of bailor and bailee, and is to be determined by the court as a matter of law; and it is misleading and error to submit to the jury the question whether the relation was that of landlord or warehouseman, although such relations were properly defined.

WAREHOUSEMEN—BAILMENT—LIABILITIES—PRESUMPTION OF NEGLIGENCE. In an action against a cold storage company for negligence in the storage of beef, there is no presumption of negligence from the fact that the beef was received in good condition and had spoiled when delivery was made; since from the nature of the chattel it may deteriorate or perish without negligence on the part of the bailee.

SAME—DAMAGES—MEASURE—INJURY TO PROPERTY. The measure of damages for negligence by a bailee for hire in the storage of beef is to be determined by the fair market value of the beef at the time it was sold when the bailment ended, and not at the time at which plaintiff intended to sell it.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered November 16, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Corbin, Ludington & Kemp and Williams & Grimshaw, for appellant.

Reeves & Reeves, for respondent.

MORRIS, J.—In this action the plaintiff and respondent sought to recover from the defendant and appellant damages for alleged negligence in the storage of meat. The case was tried before a jury, and verdict was returned for respondent.

¹Reported in 101 Pac. 721.

Many errors are assigned and discussed in the briefs, but we shall review only those involved in the conclusion reached.

The relation of the parties grew out of the following agreement:

“Wenatchee, Wash., Oct. 30, 1906.

“Agreement entered into between the Wenatchee Canning Co. and Fred N. Patterson, said Canning Co. renting to Mr. Patterson cold storage room No. 3 to be used for storing beef. Consideration \$100 per month or in proportion to that amount according to space used. Rental to commence Monday, Nov. 5, 1906.

“Wenatchee Canning Co. Per L. G. Olds.”

The trial judge, being unable to satisfy his mind what the true relation of the parties was under this so-called agreement—whether it was that of landlord and tenant or warehouseman and depositor, or both—left the question to the jury, giving them what he deemed appropriate instructions to cover each situation. Instruction No. 16 was as follows:

“Was the defendant company a warehouseman of the beef in controversy and the plaintiff Patterson a depositor of said beef for safe keeping, or on the other hand, did the relation of landlord and tenant merely exist between the parties. That is, was it merely contemplated by the parties when they contracted with each other that the defendant company should merely lease cold storage room No. 3 to the plaintiff Patterson, the same to be occupied and used by him for the storage of beef in his own way, and under his own control and at his own risk. Or, is it the fact that both of the foregoing relations existed between the parties; that is, did the defendant company lease cold storage room No. 3 to the plaintiff Patterson for the storage of beef and, in addition thereto, receive the beef into its custody and undertake the management and control of the same with a view to its preservation or safe keeping? Or, lastly, did the parties enter into a special contract, either orally or in writing, or both, whereby the duties and liabilities of each toward the other was specifically set forth and defined?”

In instruction No. 22 the jury were told that both relations might exist at the same time; the relation might be landlord

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and tenant as to room No. 3, and the company still be a warehouseman as to the beef. If the learned trial court, familiar with the various legal situations created and growing out of contractual relations, could not satisfactorily determine what was the true legal situation existing between the parties to this action, it is difficult to see how twelve ordinary jurors could. It was not proper for the court to submit these questions to the jury even upon instructions correctly defining the respective duties of the parties in these varied and different relations. The court should have determined as a matter of law what this relationship was, and then have defined it to the jury with the correct principles of law appertaining to it, leaving to the jury only the questions of fact to be determined from the conflicting evidence. Instructions should be positive and direct as to the law under which the jury are to return their verdict. The record discloses what the verdict was, but it does not, nor could it, disclose whether the damages assessed against the respondent were because of what the jury conceived to be its liability as a landlord, or as a warehouseman, or as a landlord as to room No. 3, and a warehouseman as to the beef, or whether it was made up of what was determined to be in part a liability in one situation and in part a liability as to the other. We cannot escape the conclusion that this was misleading and confusing to the jury. The relation between the parties was that of bailor and bailee, and the only law upon which it was proper to instruct the jury was the law determining the respective duties and liabilities created by such a relationship.

In instruction No. 32 the court told the jury that,

“If the beef in question was delivered to the defendant for storage and safe keeping, and the defendant received it as warehouseman, and the beef was in good condition when it was deposited, and afterwards became spoiled while in the possession of the defendant, and before redelivery to the plaintiff, then the presumption is that the beef was spoiled through the negligence of the defendant, unless it introduces evidence from which it may be fairly inferred that the spoil-

ing of the beef was not due to the breach of any duty of the defendant, in which case the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the beef was spoiled on account of the negligence of the defendant."

This was not a correct statement of the rule under the given facts. While it is undoubtedly the law that where merchandise, not perishable in its nature, is delivered to a bailee for hire, in good condition, and a redelivery is not made, or upon a redelivery the goods are found damaged, a *prima facie* case of negligence is made out; yet, like many other doctrines of the law, such a principle has its limitation, and the limitation is that the subject of the bailment be of such a nature that loss or injury could not ordinarily have occurred without negligence on the part of the bailee. To come within this rule the chattel should be of such a nature that it would not deteriorate or perish from internal defects, or through the operation of natural causes: (Schouler, Bailments and Carriers, 1905 ed., §§ 12, 80) or the defect be not the result of ordinary wear and tear: (*Wintringham v. Wood*, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725.) When a situation is shown which could not have been produced except by the operation of abnormal causes, the *onus* rests upon the bailee to show that the injury was caused without his fault. *Holt Ice & Cold Storage Co. v. Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575; *Leidy v. Quaker City Cold Storage Co.*, 180 Pa. St. 323, 36 Atl. 851.

It is within the common knowledge of all men that meat in storage will spoil, will become damaged through internal defects, or through the operation of natural causes. So that even though the meat in this case, when brought to the respondent's warehouse, was in first class condition, and the jury so believed, the loss and damage complained of might have occurred to some extent, at least, without negligence on the part of the bailee, and the instruction as given, not recognizing this fact nor providing for any qualification, was, in

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our opinion, error. Exception was duly taken to the giving of these instructions, and in addition the respondent requested the following instruction to be given:

“Where perishable goods are damaged while in cold storage, I charge you that negligence cannot be assumed and presumed from the mere fact of the damage, but the negligent acts or omissions causing the damages must be affirmatively proven.”

It follows from what we have said in connection with instruction No. 32, that the above requested instruction, or one of like import, should have been given, and its refusal, duly excepted to, was error.

The jury were also instructed that, in determining the damages, they should find the fair market value of the meat at the time at which plaintiff intended to sell the same, not later than March, 1907. This, we believe, was erroneous. The time should have been the date when the damaged meat was sold. It does not clearly appear from the evidence when that date was, but it could not have been later than February 18, at which time the bailment ended. Respondent's liability could not be extended beyond the termination of the bailment. For the same reason the testimony of the witness Bloom should have been confined to the same dates.

We find no error in the admission of the tags in evidence; nor in the testimony of the witness Davis.

The judgment is reversed, and the cause remanded for a new trial.

ALL CONCUR.

[No. 7560. Decided May 13, 1909.]

MENASHA WOODEN WARE COMPANY, *Appellant*, v.
PETER NELSON *et al.*, *Respondents*.¹

APPEAL—DECISION—LAW OF CASE. A decision on appeal becomes the law of the case on a retrial.

COVENANTS—ACTION FOR BREACH—DEFENSES. In an action on a covenant of general warranty of public lands, applied for by the grantor, but for which patent had not issued, it would be a good defense to the action if the grantee, knowing the conditions, upon consideration, agreed to perfect and complete the title, and the title failed through his neglect and default.

TRIAL—INSTRUCTIONS. It is not error to refuse a request for an instruction that is covered by another instruction.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered November 27, 1907, upon the verdict of a jury rendered in favor of the defendants, in an action on contract. Affirmed.

Belden & Losey, for appellant.

P. C. Shine, for respondents.

MOUNT, J.—Action to recover upon a warranty of title contained in a deed of real property. This is the second appeal in this case. Upon the other appeal, where the case was taken from the jury and judgment rendered in favor of the defendants, we held that the judgment should have been rendered in favor of the plaintiff for \$55 upon the second cause of action, and that upon the first cause of action the judgment should be reversed, and the cause was remanded for a new trial. The facts are fully stated in the other appeal (45 Wash. 543, 88 Pac. 1018), and it is unnecessary to restate them here. We there said:

“Upon a retrial the appellant will be entitled to a verdict in its favor for the amount of the consideration paid, with legal interest from the date of payment, unless the respondents show by competent proof, either (1) that the appellant.

¹Reported in 101 Pac. 720.

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agreed to look after and perfect the title itself or to notify the respondents or Richardson so to do, and that the title failed by reason of the appellant's failure to comply with such agreement, or (2) that the respondents were prevented from completing the Richardson entry and perfecting their title by reason of the subsequent selection which was made at the instance of or for the use and benefit of the appellant."

The case went back, and was retried by the court and a jury. Upon this retrial, the defendant relied almost wholly upon the first alternative. The jury returned a verdict in favor of the defendants, and the plaintiff has again appealed.

Several errors are assigned, but the appellant argues but three of them, to the effect (1) that this court in the other appeal laid down a rule permitting oral evidence to vary the terms of the deed; (2) that there was no evidence of any consideration moving the appellant to perfect the title in itself; and (3) that the court should have given an instruction requested by the appellant as follows:

"The court instructs the jury that the plaintiff or its agents had a right to lay scrip upon the property in question at any time after the Richardson scrip had been cancelled in 1902, and its doing so would not relieve the defendants from the liability on their warranty, if the defendant Thomas Dunn only agreed to notify defendants of defects if he heard of any, and if he did not hear of such defects until the last of the year 1905."

On the other appeal we did not lay down the rule that parol evidence might be heard to vary the terms of the deed; but, even if we did do so, the decision on that appeal became the law of this case. The defense relied upon was that the appellant, knowing the condition of the title and as part of the consideration for the deed, agreed to look after and perfect the title, and that it negligently failed to do so or to notify respondents so that they might do so; and for that reason only the title failed. There is no question about the condition of the title. The appellant or its agent was fully advised thereof. The title was not complete in respondents, be-

cause a patent had not issued from the United States. All other steps had been taken and were regular, so far as was known, and nothing apparently was to be done except to await the issuance of the patent. When this patent came to be issued, it appeared that certain revenue stamps had been omitted from the deed from the railway company to its grantee, or at least such stamps were not shown on the abstract of conveyances, and the land department required this omission to be explained or corrected within a certain time. The notice sent out by the land department was not received by the respondents, and the entry was cancelled. If the appellant as a part consideration for the deed agreed and undertook to complete the title knowing the conditions, and the title failed through its negligence or default, it is clear the respondents would not be liable on a general warranty. 17 Cyc. 655; *Windsor v. St. Paul etc. R. Co.*, 37 Wash. 156, 79 Pac. 613. On this point, in the other appeal, we said, at page 546 of 45 Washington:

"No attempt is here made to contradict the terms of the deed. The effect of the agreement and its nonperformance, if proved, is merely to show that the title failed through the neglect and default of the appellant, and this the respondents had a right to do."

We think there is sufficient evidence in the record upon which to base a finding that there was an agreement of the kind stated as a part of the consideration for the deed.

Referring now to the point with reference to the instruction, the court instructed the jury that

"There is a *prima facie* case made out by the plaintiff in this case, the Menasha Wooden Ware Company, that would entitle them to recover whatever sum the jury finds they are entitled to as damages in this case, unless as against that *prima facie* case the defendant has succeeded in establishing . . . that the Wooden Ware Company agreed to notify them of any defect in the title and perfect it themselves," etc.

In view of this instruction, it was not error to refuse the instruction requested upon which appellant now bases error,

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because the instruction given by the court required a verdict for the appellant in any event, unless the defense was proven. For that reason it was unnecessary for the court to give the requested instruction.

We find no error in the record. The judgment must therefore be affirmed.

RUDKIN, C. J., CROW, CHADWICK, DUNBAR, and FULLERTON, JJ., concur.

[No. 7566. Decided May 13, 1909.]

GUGGENHEIME & COMPANY, *Appellant*, v. GEORGE YUELL
*et al., Respondents.*¹

PRINCIPAL AND AGENT—EXISTENCE OF RELATION—SECRET AGREEMENT—EVIDENCE—SUFFICIENCY. Findings that there was a secret agreement that one C. should act as agent for defendant company in buying fruit, are sustained where it appears that the company furnished C. with money which he deposited in his own name and personally checked out in payment for fruit purchased for the company, and that the general agent of the company, prior to the time in question, told the bank they would discontinue the practice, and left orders as to whom the money was to be disbursed and had a quiet arrangement with the bank to be notified if it was disbursed otherwise, but did not order C. to discontinue the practice.

PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—PURCHASER IN GOOD FAITH FROM AGENT—ESTOPPEL—SET-OFF AGAINST PRINCIPAL. Where a dealer in fruit secretly employs as its agent to purchase fruit one who had for two years been engaged in the same business on his own account, furnishing such agent moneys therefor to be deposited in his own name and personally checked out, and permitted the agent to store the fruit purchased as the agent's property and exercise all acts of ownership over the same, when the custom of agents in that locality was to buy in the names of their principals, the principal is estopped from claiming the property or questioning the right of an innocent purchaser, after the agent had sold and delivered the fruit as his own property; especially in view of the laws of that state to the effect that one dealing with an agent with-

¹Reported in 101 Pac. 711.

out knowledge of, or reason to believe in, the agency, may set off against the principal any claim which he might set off against the agent.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered April 11, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for conversion. Affirmed.

Blattner & Chester and L. B. da Ponte, for appellant.

S. F. McAnally, for respondents.

DUNBAR, J.—This is an action by appellant against respondents for the recovery of the market value of a certain lot of dried peaches, alleged to have been converted by respondents on or about October 28, 1907, in the city of Winters, Yolo county, California, and shipped thence to Tacoma, Pierce county, Washington. Respondents answered, in substance, that they had purchased the peaches from one A. P. Craner, the agent of appellant, but that Craner's agency was unknown to and concealed from respondents, and that Craner appeared to be the owner of the peaches. At the time of filing the complaint in this action, the goods were attached, and afterwards replevined by appellant, and it was stipulated at the trial that the appellant could keep the goods and, if judgment should be for respondents, it should be for the value of the goods. This cause was tried to the court, and resulted in a judgment for respondents in the sum of \$2,165.11, which included \$1,443.30, the value of the peaches; \$196.81, profits respondents would have made on a resale thereof; \$125, expense of taking depositions in California; and \$400 attorney's fees. The attorney's fees were afterwards remitted. The court made and filed findings of fact and conclusions of law.

The court found, among other things, that, for two years or more prior to October 28, 1907, one A. P. Craner had been continuously residing at the town of Winters, California, and during such time had been engaged continuously in buying

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and selling fruit and orchard products generally, for a profit, on his own account, in, around, and near said town of Winters; that in the month of October, 1907, the plaintiff furnished to said Craner cash, which was deposited by the plaintiff, or by said Craner with the full knowledge of the plaintiff, in the private account then and theretofore kept by said Craner in the Bank of Winters; that said cash was so furnished and deposited subject to the unrestricted private check of the said Craner, as his own cash and account; that said cash was so furnished to said Craner by plaintiff in pursuance of a private secret arrangement with said Craner that said Craner would purchase some fruit for the plaintiff.

The court then finds, in substance, that, in pursuance of said secret arrangement, Craner did purchase a large quantity of Muir peaches then stored in the warehouse of the Winters Dried Fruit Company; that said peaches were allowed to stay there in the care of said Craner as his property; that Craner with his own personal check against the private bank account aforesaid paid the necessary charges of storing, handling, packing, and shipping said fruit, and exercised, as far as the public could observe, all the acts of ownership over said fruit; and that while the fruit was so stored, Craner sold and delivered to defendants fourteen thousand six hundred and eighty pounds of said fruit, which the defendants purchased in good faith for full cash value then and there paid the said Craner.

There is no question raised as to the amount of the judgment in this case, if the respondents were entitled to recover at all. Many other findings were made by the court, but these we think are sufficient for the purpose of determining the case, and the point to be decided is whether respondents took a good title to the fruit through the purchase from Craner.

The appellant excepts to a great many of the findings of fact, but especially to the finding that there was a secret understanding between Craner and the appellant and the bank in relation to a private understanding that Craner would

purchase fruit for appellant with the moneys deposited in Craner's name and on Craner's account in the Bank of Winters. But the correctness of the findings is clearly shown, we think, by the testimony of the cashier of the bank, as well as by the testimony of Mr. Bailey, the general agent for the appellant in that part of the country. Mr. Bailey went up to the bank to talk this matter over with the cashier and with Mr. Craner. He testified that he found out from the cashier that Craner was actually buying this fruit, giving his personal check in his own name. One Mason was the purchasing agent for respondents. In answer to the question:

"Now, when you were informed of this by the cashier of the Bank of Winters, prior to the time of Mr. Mason paying the money, what steps, if any, did you take as general agent for Guggenheime & Company over this territory, in reference to Mr. Craner, your sub-agent, to suppress that practice?"

he answered:

"I told the bank that we would discontinue practice of that kind. I waited until Mr. Craner came up that night, arranged a meeting with the bank cashier, Mr. Craner and myself, and arranged that no more drafts should be drawn in that manner. Question: You mean checks? Answer: No, I mean drafts, and funds belonging to the company deposited in his name. Also left a memorandum with him to whom the money was to be disbursed, and had a quiet arrangement for them to call me up, if the money was disbursed in any other way, Monday."

That was prior to the payment of the Bowman lot of peaches. But the witness testifies that he did not notify Mr. Craner of this arrangement. He also stated that he had arranged with the cashier, prior to Mr. Craner's arrival, to notify him of the disbursements if they were irregular. Again, when asked if he had a private understanding with the cashier of the Bank of Winters, that if Mr. Craner attempted in the future to pursue that practice, the cashier should give him notice, he testified, no, that he was simply to be notified of the disbursement of this specific sum of money which belonged

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to his principal, and that if it was disbursed contrary to the orders he had given, that he was to be notified. Knowing the character of the man, as is indicated by the testimony of Mr. Bailey, and that he was pursuing an irregular course with the money of the appellant which had been allowed to be deposited in his name, it still left the money there subject to his check. It is not denied that he was its purchasing agent for peaches. It also appears from the testimony that he had been buying and selling fruit and orchard products on his own account for two years, at least, prior to this transaction, and when the appellant made a secret purchasing agent of a man who had thus been engaged in the same business, viz., purchasing fruit, and was known by the community to be independently engaged in that business, placing money in his hands to be used as his own money, it seems to us that it should be estopped from questioning the right of an innocent purchaser to claim and maintain what it bought and paid for under such circumstances. It was proven that the custom in that country was for agents to purchase in the name of their principals, and to make deposits of their principals' money in the name of the principal.

The laws of California were pleaded and proven, to the effect that one who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction, may set off against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency. The laws of California also provide that no person acting as agent for another shall deal in his own name, unless it is the custom of the business in which he is engaged for him so to do. It is said by the appellant that this California law is only an enunciation of the common law, but however that may be, it seems to be applicable to this case. It is conceded by the appellant that the respondents purchased this fruit without knowledge of appellant's interest, and bought the same in good faith believing it to belong to Craner. This, in con-

nection with the laws of California, it seems to us, conclusively prohibits the appellant from recovering in this action, for the custom was undoubtedly shown to be exactly opposite to the manner in which Craner transacted his business. He was, therefore, violating the law of the state with the knowledge and consent, as is unquestionably shown by the testimony, of the appellant, and the laws of California providing a remedy for a person who deals with an agent without knowing that the agent acts as such, in connection with the admitted fact that such was the case on the part of the respondents, further discussion, it seems to us, is rendered useless.

The judgment will be affirmed.

RUDKIN, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

CHADWICK, GOSE, PARKER, and MORRIS, JJ., took no part.

[No. 7678. Decided May 13, 1909.]

**BABCOCK, CORNISH & COMPANY, *Respondent*, v. DONALD
URQUHART *et al.*, *Appellants*.¹**

ELECTION OF REMEDIES—ACTS CONSTITUTING—SUBSEQUENT SUITS—IRREVOCABILITY. An election of remedies, once made, is irrevocable; and where a plaintiff has by his first action elected the remedy of damages, and upon dismissal, commenced a second suit attempting to elect another remedy, and upon dismissal thereof commenced a third suit for damages, the defendant cannot in the last suit set up the second action as an election of an inconsistent remedy; since the election of damages was irrevocably made in the first instance, and the doctrine has no application where the remedy shown is not available.

SAME—OPTION AS TO ELECTION—WAIVER. After an election of remedies is once made, it is fixed, and does not depend upon the subsequent choice of the parties, except as it is optional to waive or plead it.

SAME—PLEADING—GENERAL DENIAL IN REPLY—EVIDENCE ADMISSIBLE. Where an election of the remedy of damages was made by

¹Reported in 101 Pac. 713.

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plaintiff's first action, which was dismissed, and plaintiff attempted to elect another remedy in a second action which was also dismissed, in a third action for damages, in which the defendant affirmatively pleaded the second action as an election of an inconsistent remedy, the plaintiff may, under a general denial in his reply, show the original election of the remedy of damages by the first action without having specially pleaded the first suit.

EVIDENCE—PAROL TO VARY WRITING—WATER RIGHTS—CONTRACT OF SALE—CERTAINTY. A written contract of sale requiring the vendor to defend the water right title to meadow lands and to convey one cubic foot of water per second for each hundred acres of meadow lands, there being 230 acres, is not so uncertain as to permit of evidence of an oral contemporaneous understanding to the effect that the grantors were not required to furnish that amount of water; and failure in this respect would be a breach of the contract.

VENDOR AND PURCHASER—CONTRACT—BREACH—DEFECTS IN TITLE. The evidence is sufficient to sustain findings that a vendor breached a contract by reason of defects in his title, where it appears that he admitted defects which he unsuccessfully attempted to cure.

VENDOR AND PURCHASER—REMEDIES OF VENDEE—FAILURE OF TITLE—MEASURE OF DAMAGES. The measure of damages on breach of covenant as to title, is the purchase price paid, and expenses incurred in pursuance of the contract, with interest, without any sum for loss of profits, where, upon failure of the vendor's title, there were no fraudulent representations as to the state of the title, which was to some extent known by the vendee, and the vendors acted in good faith and attempted to perfect the title.

Cross-appeals from a judgment of the superior court for Spokane county, A. G. Kellam, Esq., judge *pro tempore*, entered April 17, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Merritt, Oswald & Merritt, for appellants.

Cullen & Dudley, for respondent.

PARKER, J.—By this action plaintiff seeks to recover damages from defendants on account of their failure to convey title to certain land and water rights, in compliance with a contract of purchase between the parties. A jury being waived, trial was had before the court, resulting in findings and judgment against the defendants for the amount paid by

plaintiff upon the purchase price, and an attorney's fee paid by it for examination of title, with interest. Both parties have appealed, defendants contending that plaintiff is not entitled to any recovery, and plaintiff contending that it is entitled to recover for the loss of its bargain in addition to the amount paid on the purchase price and attorney's fee for title examination, as adjudged by the trial court. Exceptions were taken by both plaintiff and defendants to certain of the court's findings, as well as to the refusal of the court to make certain of the findings proposed by each. Upon a review of the entire evidence we are not disposed to regard the ultimate facts different in any material respect from those found by the trial court, which, so far as material to the matters here for review, are as follows:

The plaintiff is a corporation, and the defendants are husband and wife. On August 29, 1903, the parties entered into a contract for the sale of certain land, water rights, and personal property in Douglas county, the provisions of which, so far as necessary for our consideration, are as follows:

"This Agreement, made this 29th day of August, A. D., 1903, between Donald Urquhart and Abbie Urquhart, husband and wife, of the county of Douglas and state of Washington, of the first part, and Babcock, Cornish & Co., a corporation organized under the laws of the state of Washington, party of the second part;

"Witnesseth, That in consideration of the stipulations herein contained, and the payments to be made as hereinafter specified, the parties of the first part hereby do sell unto the party of the second part the following described real property situate in the county of Douglas, state of Washington, and more particularly known and described as follows, to-wit:

"The parties of the first part agree to furnish a good and sufficient title to all of the lands heretofore described and any personal property hereinafter mentioned and conveyed, and to also warrant and defend the water right title to all the meadow lands, contained in all the lands conveyed showing commercial title with privilege of taking from stream known as Crab creek, a sufficient amount of water to irrigate all the

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meadow lands, to the extent of one cubic foot per second for each one hundred acres contained in said tract, provided that an amount of water necessary for above irrigation shall flow from the lake or swamp at the head of this stream."

On the date of the contract, plaintiff paid to defendants \$10,000 upon the purchase price, which payment was made partly by the assignment of a note and mortgage and partly in cash. By the terms of the contract a deferred payment was to be made November 30, 1903, when a deed was to be given by defendants, and further deferred payments secured by mortgage to be given back by plaintiff. The arguments of counsel for all parties assume that the whole purchase price was to be \$60,000, and the evidence also so indicates, though the contract states it to be a larger amount. Of the land conveyed by the contract there is 230 or more acres of meadow land which lies so it could be irrigated from the waters of Crab creek, and there flows in Crab creek sufficient water therefor to the extent of one cubic foot per second for each one hundred acres of the meadow land.

Prior to the making of the contract, officers of the plaintiff had investigated, were advised of, and knew to some extent, the condition of the title to the water rights of the defendants in connection with the land. No false or fraudulent representations were made by the defendants to the plaintiff at or before the making of the contract, in respect to their water rights in connection with the land. In addition to the \$10,000 paid upon the purchase price, plaintiff incurred an expense of \$50 paid to its attorney for an examination of abstracts of title furnished by defendants. A few days after the execution of the contract, defendants furnished to plaintiff abstracts of title for the purpose of showing the condition of their title to the land and water rights agreed to be conveyed, which abstracts did not show good title in the defendants for the quantity of water to be conveyed with the land by the terms of the contract. These abstracts were by plaintiff submitted to its attorney for examination, who reported in

writing to it that they did not show good title in defendants to the water rights to the extent required by the contract; a copy of which report was by plaintiff transmitted to the defendants with the request that they perfect their title and be prepared to carry out their contract; and on November 29, 1903, plaintiff was able, willing, and notified defendants that it was ready, to make the payments due upon the contract the following day, and execute notes and mortgage for the further deferred payments; but the defendants were then unable to convey the quantity of water required by the contract.

About Christmas time, 1903, defendants advised plaintiff that they had not been able to procure the quantity of water agreed to be conveyed by the contract, and requested plaintiff to rescind the contract, which plaintiff declined to do. Thereafter, in other conversations with plaintiff's representatives, the defendant Donald Urquhart stated that the defendants could not fulfill their contract as to furnishing the quantity of water required. Thereafter plaintiff refused to accept from the defendants deeds for the property agreed to be conveyed, which were tendered by defendants, upon the ground that the defendants were not the owners of and could not convey good title to the quantity of water stipulated in the contract, and for the same reason plaintiff refused to make further payments on the purchase price until good title was so furnished. The possession of the property was never transferred from the defendants to the plaintiff.

In August, 1904, the plaintiff commenced in the superior court for Spokane county an action against the defendants for damages on account of their failure to convey good title to the property as agreed by the terms of the contract; in which action substantially the same facts are alleged as grounds for relief, and the same prayer made for recovery of damages in its complaint, as in this action, and which action was thereafter dismissed. In February, 1905, the plaintiff commenced in the superior court for Spokane county a second action against the defendants, in which substantially the same.

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facts are alleged as grounds for relief in its complaint as in this action; the prayer in the complaint differing from the prayer in this action in that it was in the alternative and, in substance, that by proper decree the defendants be required to reassign the note and mortgage assigned by plaintiff to defendants as part of the \$10,000 paid on the purchase price, that it have judgment for the cash then paid, with interest, and for the further sum of \$11,380.20, the latter of which included damage for loss of its bargain, or if the defendants could not or would not reassign the note and mortgage, then that plaintiff have judgment for the whole amount of first payment on purchase price, and its additional damages for loss of bargain. That action was transferred to Douglas county for trial, and was dismissed in July, 1905.

The trial court rendered judgment in this case in favor of plaintiff and against defendants, in April, 1908, for \$12,830, being for \$10,000, the amount paid on the purchase price, \$50 attorney's fees for examination of title, and interest.

Counsel for defendants now contend that by commencing the second action in February, 1905, wherein plaintiff prayed for the reassignment of the note and mortgage assigned by it to defendants as part of the first payment upon the purchase price of the property, the plaintiff thereby elected a remedy which is inconsistent with the prayer in this action, and that it is thereby precluded from maintaining this action. Many authorities are cited and reviewed in support of the general doctrine that the definite adoption of one of two or more inconsistent remedies by a party fully acquainted with all the material facts is a conclusive and irrevocable bar to his resort to the alternative remedy. The view we take of this branch of the case renders it unnecessary to determine the question of the alleged inconsistency between the second action and this one. Whatever might be the determination of that question it is certain there is nothing inconsistent between this action and the first one commenced in August, 1904. That action, like this one, was simply a suit for damages on account of de-

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fendants' failure to furnish good title to the property agreed to be conveyed. If the doctrine of election of remedies has any application to this controversy, it seems plain to us the election was made when the plaintiff commenced its first action in August, 1904. If any subsequent action by plaintiff is inconsistent with the remedy then invoked it was the second and not this one. Counsel for both sides cite numerous authorities supporting the doctrine that an election once made is irrevocable and conclusive, which we regard as the well settled rule. 15 Cyc. 262; 7 Ency. Plead. & Prac., 364; *Gaffney v. Megrath*, 23 Wash. 476, 63 Pac. 520; *Connihan v. Thompson*, 111 Mass. 270; *Thompson v. Howard*, 31 Mich. 309; *Conrow v. Little*, 115 N. Y. 389, 22 N. E. 346, 5 L. R. A. 693; *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 51.

But counsel for defendants contend that as between the first and second actions commenced and dismissed by plaintiff, they and not the plaintiff have the right to choose which should be taken as plaintiff's election of remedies. We do not regard this as a matter to be determined by the choice of either party. After the election is once made, as it was by the commencement of the first action, the law then fixed the rights of the plaintiff as to the nature of the remedy it might pursue, and limited it to such a remedy as would not be inconsistent with that action. It is true that it was optional with the defendants to plead a former election by the plaintiff of an inconsistent remedy, as a defense; and so it was optional with them to plead or waive any other defense they might consider themselves entitled to invoke, but when they sought to set up the second action as an election of remedies by the plaintiff, we think the plaintiff had the right to show that there had been a previous election by it, by the commencement of the first action which was not inconsistent with this. We see no reason for regarding the first election any less conclusive because there is more than one subsequent suit. The case of *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571, in some measure supports this view. No other case has come to

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our notice involving more than two actions. We are of the opinion that, in view of the commencement of the first action, the second action was not an election of remedies in the sense that plaintiff was thereby precluded from prosecuting this action. If the second action was inconsistent with the first, which we do not decide, it was not available. It was a mistaken remedy. There are also other reasons suggested in the record and arguments indicating that it was not an available remedy at that time, which, however, we need not here discuss. It seems well settled that the doctrine of election of remedies has no application when the remedy chosen is not available, and we think a remedy is not available when there is a good defense to it. Whether or not the defense is invoked or waived does not change the election. *Belt v. Washington Water Power Co.*, 24 Wash. 387, 64 Pac. 525; *Magnus v. Woolery*, 14 Wash. 43, 44 Pac. 130; *Zimmerman v. Robinson & Co.*, 128 Iowa 72, 102 N. W. 814; 15 Cyc. 262.

In this connection defendants counsel contend that evidence of the commencement of the first action is not properly before the court in this case, since they affirmatively plead in their answer the election by the commencement of the second action, which plaintiff met in its reply by general denial, though admitting the fact of the commencement of the second action. Defendants' counsel objected to the admission of evidence of the first action because the same was not specially pleaded in the reply. We think, however, while they did not, in so many words, plead in their answer that the second action was an election of remedies, such is the effect of that plea, and this being denied in the reply, rendered admissible any evidence which tended to show that the second action was not an election. Evidence of the first action did so show, and we think it was therefore admissible.

Defendants sought to show by oral evidence that they were not required to furnish the amount of water claimed by plaintiff under the contract. This evidence consisted of conversations between the parties previous to and contemporaneous

with the making of the contract. While this evidence had some legitimate bearing upon the number of acres for which water was to be furnished, and also upon the defendants' alleged fraudulent representations as to their title to the water rights, as affecting the measure of plaintiff's damages by reason of failure of title, we do not think the terms of the written contract were of such uncertain character as to require or admit of any oral evidence of contemporaneous or previous conversations to make clear its meaning. It may not, in this particular, be very aptly worded, but to any one acquainted with the English language, it could have no other meaning than that defendants were to convey good title to the water rights to the extent of one cubic foot per second for each one hundred acres of meadow land, which the evidence clearly shows to be at least 230 acres in extent. We think it clear that a failure to furnish good title to water rights to this extent would be a breach of the contract by defendants entitling plaintiff to recover.

Were defendants unable to and did they fail to furnish title to the water required by the terms of the contract, and thus breach the contract? In answering this inquiry we do not feel called upon to review the lengthy abstracts of title furnished by defendants to plaintiff and offered in evidence, in view of defendants' admission of defects in their title to the water rights and their voluntary efforts to cure the same, covering a period of several months immediately following the date of the contract. The trial court made findings touching the condition of defendants' title as shown by the abstracts, in considerable detail, from which, together with the admission of defects, it concluded that defendants had failed to convey and could not convey the quantity of water agreed upon, and thus were unable to carry out their contract. We regard the evidence as fully warranting this conclusion.

Upon plaintiff's cross-appeal it contends that, in addition to the amount awarded by the judgment in this case, it is entitled to an additional sum as damages for loss of its bargain.

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This presents the question of the measure of damages in cases of this character, and for a proper solution depends upon the nature of the representations made by defendants to plaintiff at and prior to the making of the contract, and their conduct evidencing good or bad faith thereafter as to carrying it out. The evidence seems to fully support the trial court's findings to the effect that there were no fraudulent representations made by the defendants to the plaintiff in respect to the water rights owned by them, at or prior to the making of the contract, and also that plaintiff at the time knew to some extent of the condition of those rights. Indeed, there is some evidence tending to show that the defendant Donald Urquhart expressed to plaintiff's representatives some doubt as to his ability to furnish title to all of the water required by the terms of the contract, and even hesitated to sign the contract on that account. There is nothing in the court's findings nor in the evidence indicating any lack of good faith on the part of the defendants in their efforts to perfect their title after the contract was made, nor any unwillingness on their part to carry it out so far as they could. This, in our opinion, brings this case, so far as measure of damages is concerned, within the rule which excludes compensation to the purchaser for loss of his bargain, but allows him to recover moneys paid upon the purchase price and expenses legitimately incurred in pursuance of the contract, with interest. This has been adopted as the measure of recovery by this court in cases where the seller is free from false representations or fraud inducing the purchase, and free from bad faith in his disposition to carry out the contract after it is made: *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455; except, the specific matter of including in the recovery expenses incurred by the purchaser in connection with the contract, in addition to sums paid on the purchase price, does not seem to have been before this court. The allowance of such expenses, however, as a part of the recovery is in no way inconsistent

with its holdings. In 2d Sutherland on Damages (3d ed.), § 582, in discussing what are the elements of damage under the rule which excludes damage for loss of bargain, in such cases, it is stated:

“Where only nominal damages can be recovered for the loss of the bargain, the vendee is entitled to recover his deposit, any payments he may have made on the contract of purchase with interest, and expenses incurred in investigating the vendor’s title.”

Our conclusion renders it unnecessary to discuss other matters presented in the arguments. We are of the opinion that the judgment of the trial court should be affirmed. It is so ordered.

Neither party will recover costs in this court.

RUDKIN, C. J., CHADWICK, MOUNT, CROW, MORRIS, FULLETON, and GOSE, JJ., concur.

[No. 7835. Decided May 14, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. J. A. McINTYRE,
Appellant.¹

LARCENY—ANIMALS ON RANGE—RECENT POSSESSION—PRESUMPTIONS—DIRECT EVIDENCE—EFFECT. In a prosecution for larceny of horses running on the range, the state is entitled to the benefit of the presumption of guilt given by Bal. Code, § 7114, which provides that proof of possession of such animals shall be *prima facie* evidence that possession was acquired recently, and shall cast the burden of explanation upon the defendant; although there was direct evidence on the part of the state that the horses were feloniously taken from the range by the accused, as the presumption is only cumulative of the direct evidence (Rudkin, C. J., dissenting).

SAME—INFORMATION—DESCRIPTION OF ANIMALS ON RANGE—SUFFICIENCY. An information for the larceny of fifty-one horses running on the range, described as mares and geldings belonging to the state, is sufficient under the statute, although there was no specific description of the several animals sufficient to identify them in any subsequent prosecution.

¹Reported in 101 Pac. 710.

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Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered May 18, 1908, upon a trial and conviction of the crime of horse stealing. Affirmed.

Cain & Hurspool, for appellant.

Otto B. Rupp, John H. McDonald, and Herbert C. Bryson, for respondent.

FULLERTON, J.—The appellant was convicted of the crime of horse stealing, the charging part of the information being as follows:

“John A. McIntyre is accused by the Prosecuting Attorney of the County of Walla Walla, and State of Washington, by this information of the crime of horse stealing, committed as follows: The said John A. McIntyre on or about the 28th day of October, 1907, in the county of Walla Walla aforesaid, did take, steal, lead and drive away fifty-one head of horses, consisting of mares and geldings, the exact number of each being to the prosecuting attorney unknown, said horses being the property of the state of Washington, contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the state of Washington.”

The evidence tended to show that on October 28, 1907, the appellant, with Paul Kruger, John Tyacke, Jr. and Richard Tyacke, went from Walla Walla county into the county of Benton, and there took from the range, where they were running at large, fifty-one head of horses, drove them into the county of Walla Walla and from there shipped them on cars to East St. Louis, Illinois, where they were sold. None of the horses belonged to the parties taking them, nor was the ownership of any of them discovered before the trial, except some seven head which were found to belong to one W. R. Montgomery. Paul Kruger testified that the horses were taken from the range with the intent to steal them, and that the act was the joint enterprise of all of the persons engaged therein.

On the trial the court instructed the jury as follows:

"And, if you find from the evidence that these horses or any of them were running upon the range by the permission of their owner, and the defendant were found in possession of these horses, that evidence would raise a presumption that this possession was recently acquired by him, and throws upon him the burden of explaining such possession. . . .

"As I have said to you before, if you find that these horses or any of them were running upon the range within this state by permission of the owners, proof of their possession or possession of any one of them by persons accused of stealing them raises a presumption that such person or persons acquired such possession recently, and has the effect of throwing upon such person or persons the burden of explaining the possession. If such person or persons fail to make any explanation or a reasonable explanation, the jury is warranted in drawing the inference, if they think it fair and proper under such circumstances, that such person or persons stole such property; but if such person or persons give a fair and reasonable explanation, one which the jury in view of all the circumstances deems a reasonable one and which exculpates the accused person, they are not bound to draw such inference and should not do it."

The appellant was found guilty of the crime charged, and this appeal is from the judgment pronounced upon him.

Two errors are assigned. (1) The giving of the instruction above quoted, and (2) that the stolen property was not sufficiently identified. These assignments will be noticed in their order.

The statute relating to presumptions arising from the possession of stolen property, which the owner has permitted to run on the range, reads as follows:

"In all prosecutions for larceny under the last preceding section, where the animal alleged to have been stolen was permitted by its owner to run on the range, proof of possession of the animal by the person accused of stealing the same shall be prima facie evidence that the accused acquired possession thereof recently, and shall have the effect of throwing on the accused person the burden of explaining such possession." Bal. Code, § 7114 (P. C. § 1616).

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Opinion Per FULLERTON, J.

The appellant contends that the presumption declared by the statute to arise from the possession of property, which the owner has permitted to let run upon the range, is similar to that arising from the recent possession of stolen property at common law, and arises to supply the place of actual proofs, and that when actual proofs are present there is neither foundation nor room for presumption, and argues therefrom that in the case at bar it was error to charge the jury concerning the presumption arising from the statute at all, for the reason that the proofs were direct that the taking was felonious. Cases are cited which seemingly maintain this doctrine, but we are not convinced of their soundness. There can be no valid reason why a jury may not in every criminal case consider all of the legal evidence before them which tends to show the guilt of the accused. A presumption tending to establish a fact in dispute, arising from other facts proved or admitted, is as much evidence of the disputed fact as is direct testimony to the fact. The one may in some instances be weaker than the other, but weakness of evidence does not destroy its character as evidence. In the case at bar there was no conflict between the direct evidence tending to show the felonious taking and the presumption arising from the fact that the appellant was found in possession of the stolen property. Both the direct evidence and the presumption tended to establish the guilt of the accused, and instead of the one superseding or crowding out the other, the proofs were merely cumulative. We can see no reason, therefore, why the state should not have had the benefit of both classes of proofs, and we find no error in the instructions given.

The second contention is that there was no such description of the several animals alleged to have been stolen as would enable the defendant to show this conviction as *res judicata* should he be hereafter charged with the theft of one or more of these particular animals. But the description of the animals was sufficient to satisfy the statute. It would hardly be possible to describe these several animals in an information

so that they could be recognized from the description alone. This is true also of almost any article of personal property. When, therefore, a plea of former conviction or former acquittal is interposed as a defense to a charge of larceny, a resort may be had to extrinsic proofs to show the identity of the thing he is accused of taking with that described in the earlier charge. So in this case should the appellant be again charged with the larceny of any of the animals mentioned in this information, he can show the identity of the animals by parol. There is no error in the record and the judgment will stand affirmed.

CROW, CHADWICK, MOUNT, and DUNBAR, JJ., concur.

GOSE, PARKER, and MORRIS, JJ., took no part.

RUDKIN, C. J. (dissenting)—I dissent. It is only the unexplained possession of recently stolen property that gives rise to a presumption of guilt, and when the possession is fully explained and accounted for by the prosecution, as in this case, there is nothing upon which the presumption or inference may rest. The instruction complained of was wholly inapplicable to the facts before the jury and would naturally tend to prejudice the rights of the accused. *Heed v. State*, 25 Wis. 421; *State v. Spencer*, 4 Penn. (Del.) 92, 53 Atl. 337.

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Opinion Per Curiam.

[No. 7479. Decided May 15, 1909.]

A. C. GEORIG, Respondent, v. ANDREW PETERSON, Appellant.¹

APPEAL—REVIEW—VERDICTS. A verdict supported by conflicting evidence will not be disturbed on appeal.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 13, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover the purchase price of property sold and delivered. Affirmed.

Gill, Hoyt & Frye, for appellant.

James T. Lawler, for respondent.

PER CURIAM.—Action by A. C. Georig against Andrew Peterson, to recover \$3,500, the purchase price of a steam shovel which he alleged he had sold and delivered to defendant. From a verdict and judgment in favor of the plaintiff, the defendant has appealed.

Appellant denied the purchase, and alleged that the respondent had leased the steam shovel to him upon terms and conditions which it is not necessary for us to state. The determination of the issue whether the machine had been sold or leased, was solely within the province of the jury, and its verdict resolved such issue in respondent's favor.

Appellant's assignments of error are (1) that the trial court erred in overruling his motion for a new trial, and (2) that the evidence was not sufficient to sustain the verdict of the jury. The latter assignment is the only one discussed. The evidence, although conflicting, was sufficient to sustain the verdict, which we cannot disturb.

The judgment is affirmed.

¹Reported in 101 Pac. 829.

[No. 7399. Decided May 15, 1909.]

MINNIE W. HARKINS *et al.*, *Respondents*, v. SEATTLE
ELECTRIC COMPANY, *Appellant*.¹

CARRIERS—NEGLIGENCE—TAKING UP PASSENGERS—PLATFORM AND LIGHTS. There is sufficient evidence of negligence on the part of a street railway company to make a case for the jury, where it appears that an intending passenger was struck by an approaching car while she was standing on the first or second step at the bottom of a stairway leading down to defendant's tracks, on a crossing used by the public, very near the end of defendant's platform intended for passengers, that passengers were in the habit of getting on and off the cars from the stairs, that the place was very poorly lighted and the night so dark that the plaintiff could not see that she would be struck by the car, and the car was going at considerable speed and her signal to stop was not heeded by the motorman.

SAME—CONTRIBUTORY NEGLIGENCE. In such a case, the plaintiff was not guilty of contributory negligence as a matter of law.

SAME—INSTRUCTIONS—DUTY TO STOP FOR PASSENGER. Instructions as to the duty of a motorman to keep a lookout for passengers are not erroneous in that they were not restricted to regular stopping places, where the evidence and circumstances of the case related only to a regular stopping place.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—STATING REASONS—ASSIGNMENT OF ERRORS. Where an exception to an instruction that a street railway company owes the highest degree of care to avoid injury to one who is about to become a passenger is excepted to because it "did not leave to the jury the question whether the plaintiff presented herself at the proper time and place," error cannot be assigned thereon for the reason that the company owes such degree of care only to persons who had already become passengers, notwithstanding that it was unnecessary to state the reasons for the exception under Bal. Code, § 5053.

RUDKIN, C. J., MORRIS, and CHADWICK, JJ., dissent.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 21, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger who was struck by a street car. Affirmed.

¹Reported in 101 Pac. 836.

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Opinion Per PARKER, J.

James B. Howe and A. J. Falknor, for appellant.

P. V. Davis, for respondents.

PARKER, J.—This is an action to recover damages for personal injuries, which plaintiffs maintain resulted to the plaintiff Minnie W. Harkins from the negligence of the defendant. It is alleged by the complaint, in substance, that plaintiffs are husband and wife; that the defendant is a corporation and a common carrier of passengers, owning and operating a street railway system; that on the evening of the 21st of January, 1906, at about 8:30 o'clock, the plaintiff Minnie Harkins, without negligence on her part, was standing, waiting to take a car at one of defendant's regular stopping places for taking on passengers, when she was suddenly and violently struck by one of its cars, through the negligence of the defendant and its servants; by which she was greatly and permanently injured; that the defendant negligently maintained and suffered said place to be and remain in a dangerous and unsafe condition, in that it was in dangerous proximity to defendant's tracks, and that it was not properly lighted or guarded; that the defendant's servants in charge of the car were negligent in not keeping a proper lookout ahead, and in not stopping the car or giving her proper warning of their intention not to stop; and that the plaintiff was greatly damaged by such injuries.

The defendant by its answer denied all of the allegations of negligence charged against it in the complaint, denied that plaintiff was damaged, and also affirmatively pleaded that the injuries, if any, received by the plaintiff were caused by her own careless and negligent acts. Upon these issues a trial was had before the court and a jury, resulting in a verdict and judgment for \$700 against the defendant, from which it appeals to this court, assigning errors which we will review in the order of appellant's brief, noticing the facts pertaining to each as may become necessary.

It is first contended that the trial court was in error in

denying defendant's motion for a nonsuit at the close of plaintiffs' evidence, which motion was made upon the grounds that no sufficient evidence had been introduced to show negligence on the part of the defendant to warrant the court in submitting the cause to the jury. At this point in the trial the evidence offered by plaintiff tended to show, that when injured she was standing on the first or second step at the bottom of a stairway leading down to defendant's tracks from a roadway some six feet above, the bottom step being so close to the track that a person standing thereon, unless inclined away from the track, would be struck by the body of a passing car; that the stairs were on a crossing used by the public, and were also very near the end of a platform intended for passengers in getting on and off the cars; that passengers were also in the habit of getting on and off the cars from the stairs; that at the time of the accident, about 8:30 in the evening, the place was very poorly lighted; that it was a dark and somewhat foggy night; that there were no artificial lights maintained by the defendant either on the platform or the stairs, though there were three sixteen candle power incandescent electric lights some twenty feet away, so situated however as to throw the platform in the shadow of other objects, making it quite dark, and also leaving the proximity of the track to the lower part of the stairs not readily discernible; that plaintiff had never boarded the cars at this place before, but had passed there on the cars, had seen people get off and on, and supposed they had gotten off and on from the place where she was standing; that it was so dark at the platform that she could not see it from where she was standing; that when the car approached she waived her hand several times for it to stop; that the motorman apparently did not heed her signal; that she could see the headlight as the car approached, but not the outline of the body of the car; that she was then struck by the body of the car, knocked down and seriously injured; that the car was running at considerable speed when passing the steps, the motorman

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Opinion Per PARKER, J.

not being able to stop until it had run a considerable distance, one witness placing the distance as much as a hundred yards.

The only witness who actually saw the accident besides plaintiff, testified that he was standing at the top of the stairs, that he saw plaintiff standing at the bottom, and that "It was so dim that I don't see how a person standing down there where she was could see at all." We think this evidence pointing to defendant's negligence was ample to warrant the submission of the cause to the jury, and that defendant's motion for nonsuit was properly denied.

At the conclusion of the trial defendant's attorneys moved for judgment upon the evidence, and later moved the court for judgment for the defendant notwithstanding the verdict. We do not see any stronger reasons in support of these motions than could have been urged in favor of the original motion for nonsuit. The case, in our judgment, was still a proper one to submit to the jury. Substantially the only difference being that there was, at the close of the trial, conflict in the evidence upon some of the main facts; and the evidence of plaintiff's contributory negligence was not sufficient to take the case from the jury.

Defendant's counsel contend that the trial court erred in giving the following instruction:

"You are instructed that it is the duty of the motorman of a street car to keep a careful and constant lookout ahead of the car for the purpose of discovering any persons signaling the car to stop, in order that such passenger may board it, and any person who signals the car to stop in time to enable the motorman to do so by the exercise of ordinary care has a right to assume that such motorman is on the lookout for passengers, and will discover persons who so indicate their intention of becoming passengers, if the same could be done by the exercise of ordinary care on the part of the motorman."

Counsel argue that the giving of this instruction was not applicable to the cause and was prejudicial to the defendant, contending that; "It is not necessary for the motorman to

keep a constant lookout ahead of the car to discover persons signalling the car to stop. It is only when such signals are made at the proper place, and it is only at the regular stopping places that it is the duty of the motorman of a street car to keep a careful lookout ahead to discover intended passengers." Conceding for sake of argument that the motorman was not required to keep such constant lookout, other than at regular stopping places where passengers might be expected, we think, nevertheless, the place where the plaintiff is conceded to have stood and signalled was so near the platform which the defendant claims was the proper place for her to be that the jury were not led astray into considering the motorman's duty in that regard at places other than stopping places. She was, in any event, within a few feet of the platform and within a foot or two of the track, and on a step as high or higher than the platform, as well as at a point where the general public crossed the track. Standing alone, as a mere abstract proposition of law, possibly this instruction states a little more than the full duty of the motorman, but it does not state more than his full duty at the place of the accident; and taking the instruction in connection with other instructions given, and the evidence, none of which related to any other place on the defendant's line of railway, it is evident that the jury as reasonable men must have known that the court was defining the motorman's duty in approaching that particular stopping place and crossing.

In the case of *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 335, 58 Pac. 244, this court said:

"An instruction must always be construed in the light of the evidence in the particular case in which it is given, and, if applicable to the evidence of that case, it will not be held erroneous, even though conditions may be conceived where it would not be a correct statement of the law."

We conclude that the giving of this instruction did not constitute prejudicial error.

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Opinion Per PARKER, J.

Error is claimed by the defendant's counsel based upon exceptions taken to one of the court's instructions as follows:

"The defendant excepts to that portion of the court's instructions whereby the court states, 'it is the duty of the defendant, its officers, agents and employes engaged in the operation of such railway and cars, to use the highest degree of care, prudence and caution, consistent with the practical operation of its said road, so as to avoid injuring those who want to board the car and become passengers,' as this instruction does not leave to the jury the question of whether or not the plaintiff presented herself at a proper time and in a proper place to become a passenger."

In their brief and argument on this appeal, counsel for defendant ignore the grounds and reasons of their exceptions stated to the trial court as above quoted, and now contend that the instruction imposes upon the defendant a higher degree of care than is required by law, and that the rule of the instruction is only applicable as to persons who have become passengers. Plaintiffs' counsel contend that this alleged error should not be considered on appeal, for want of proper exceptions, which contention we regard as well founded. We are not now asked to test the correctness of this instruction in the light of the court's failure to present to the jury the question of whether or not the plaintiff presented herself at the proper place to become a passenger, but are asked to review a different question which was not called to the attention of the lower court. We are not unmindful of the general rule in this state that exceptions to instructions can be properly taken by simply so stating to the court and specifying the parts excepted to without assigning reasons or grounds of exception. Bal. Code, § 5053 (P. C. § 670); *Sexton v. School District*, No. 34, 9 Wash. 5, 36 Pac. 1052. But notwithstanding this liberal rule of our statute, the object and purpose of exceptions, which are the same now as before the statute was passed, should be kept in mind when their sufficiency is being challenged. It is elementary that the office of an exception is to call the attention of the court to some specific

matter as to which error is claimed. 2 Cyc. 714. And when counsel except to an instruction, and at the same time claim that the same is erroneous in certain particulars and for certain reasons, we think he waives other grounds of error which might be urged against the instruction, so far as his right to have the same reviewed on appeal is concerned. In the case of *Sweeney v. Pacific Coast Elevator Co.*, 14 Wash. 562, 45 Pac. 151, referring to an instruction excepted to in a manner similar to this, this court said: "Only one of the instructions given is questioned here and that one was especially excepted to upon a different ground from that now urged, and for that reason it is not entitled to consideration." That decision was rendered some years after passage of the statute.

We find no prejudicial error in this record, and the judgment of the superior court is therefore affirmed.

CROW, MOUNT, DUNBAR, GOSE, and FULLERTON, JJ., concur.

RUDKIN, C. J., MORRIS, and CHADWICK, JJ., dissent.

[No. 7522. Decided May 15, 1909.]

CLALLAM LAND & INVESTMENT COMPANY, *Appellant* v.
SAMUEL C. JACKSON *et al.*, *Respondents*.¹

TRUSTS—ESTABLISHMENT—EVIDENCE. An option to purchase timber on lands owned by the plaintiff, and other lands which plaintiff expected to buy, is not sufficient to make the defendant a trustee for the plaintiff as to other lands in the vicinity purchased of third persons, where plaintiff had nothing to do with such purchase and did not aid therein or advance any of the purchase price, even if an officer of the defendant stated to an officer of the plaintiff, that, if the purchase was made, the lands should come within the option agreement.

SAME—VALIDITY—CONSIDERATION. A naked promise to buy lands with one's own money and hold them for another is without consideration and cannot be enforced in equity.

¹Reported in 101 Pac. 832.

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Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered February 26, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to declare a trust in real property and for an accounting. Affirmed.

Vince H. Faben, for appellant.

Jesse A. Frye, for respondents.

FULLERTON, J.—In March, 1907, the respondent Pacific Logging and Timber Company purchased of one Hoyt and the MacLae Estate Company a tract of land, called by the parties the MacLae tract, situated in Clallam county, in this state, containing 8,361 acres, paying therefor \$8.12 per acre, or a total sum of \$67,891.32, taking the title thereto in its own name. At the time of this purchase there was a contract existing between the appellant and the respondent Pacific Logging and Timber Company, by the terms of which the respondent was given the exclusive right, privilege, and option to purchase all of the standing, growing and fallen timber upon certain described lands, at the rate of \$2 per thousand feet stumpage. The lands described were in part the property of the appellant, and in part the lands of private individuals which the appellant expected to purchase should the respondent corporation exercise its privilege of taking up the option.

It is the appellant's contention that this MacLae tract was purchased by the respondent corporation under the terms of this agreement, with the modification that the respondent was to advance the purchase price and hold the land as security for the same until such time as the rights of the parties could be adjusted thereunder. After the purchase was made the respondents refused to assent to the contention that this purchase fell within the agreement, and this action was brought to have the respondent corporation declared to hold the land in trust for the appellant, for an accounting between the parties, and upon such accounting

that the respondent corporation be required to deed the land to the appellant and pay it such sum as would equal the difference between the value of the timber at \$2 per thousand feet stumpage and the sum the respondent paid for the land, which difference it averred to be \$132,108.68. Issues were made on the allegations of the complaint, and a trial was had, which resulted in a judgment for the respondents.

In our opinion the evidence wholly fails to establish a trust in the lands in favor of the appellant. The appellant had no option or contract of any kind with the owners for the purchase of the property; it did not have it for sale for the owners, nor did it have any communication with the owners concerning its sale; it did not aid in any way in the negotiations taking place when the respondent purchased it, nor did it advance any part of the purchase price. It bases its claim entirely upon the contention that an officer of the respondent corporation orally promised an officer of the appellant that if his corporation purchased the land it would treat it as falling within the contract above mentioned. That such a promise was made is denied by the respondent's officer who is alleged to have made it, and it is shown that he had no authority from the trustees of the corporation to make such a promise on behalf of the corporation. But if we conceded the weight of the evidence to be with the appellant, the breach of the promise would furnish no foundation for declaring a trust in the lands. There was no consideration for the promise, and the naked promise of one to buy lands in his own name, pay for them with his own money, and hold them for the benefit of another, cannot be enforced in equity. *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027.

The evidence is voluminous, but it is needless to pursue it in detail. We are clear that no other judgment than the one entered by the trial court is warranted thereby, and it will stand affirmed.

RUDKIN, C. J., CROW, MOUNT, and DUNBAR, JJ., concur.

CHADWICK, GOSE, MORRIS, and PARKER, JJ., took no part..

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Opinion Per Crow, J.

[No. 7531. Decided May 15, 1909.]

JAMES I. ST. JOHN, *by his Guardian etc., Respondent*, v.
CASCADE LUMBER & SHINGLE COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action by an offbearer from a band saw, who was injured after placing a slab on the live rolls, by reason of the head block of the saw carriage striking the same when it was "gigged back," the questions as to the negligence of the master in furnishing a safe place, of the sawyer in not observing the position of the slab, and the assumption of risks and contributory negligence of the plaintiff in not truly placing the slab on the rolls, are for the jury, where it appears that the log being sawed was a short one held by the rear and middle blocks, making the operation more dangerous than usual, that the plaintiff was required to perform other duties, and after placing the slab, as he supposed correctly, was injured while attempting to remove a splinter from the saw as the log was rapidly moving back, and where plaintiff had worked in that position but three days.

TRIAL—INSTRUCTIONS—CONSIDERED AS A WHOLE. Error cannot be predicated on separate instructions where, considered as a whole, they properly state the law.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered March 6, 1908, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for injuries sustained by an offbearer in a sawmill. Affirmed.

Richard Stevens Eskridge and *Brownell & Coleman*, for appellant.

Cooley & Horan, for respondent.

Crow, J.—Action by James I. St. John, a minor, by his guardian, against Cascade Lumber & Shingle Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendant appeals.

The appellant, respondent's employer, owned and oper-

¹Reported in 101 Pac. 833.

ated a sawmill, equipped with a band saw, log carriage, systems of live rollers, and other machinery. The saw and carriage were under the control of appellant's head sawyer, who directed their movements. The live rollers, parallel to the carriage-way, were immediately to the rear of the saw and operated by respondent as offbearer. The log carriage was equipped with three head blocks. The distance between the front and center block was about twelve feet, and that between the center and rear blocks about ten feet. At the time of the accident, a log twelve feet in length, placed on the center and rear blocks, was being sawed. When a cut was made, the slab would be taken in charge by respondent, whose duty it was to place it on the live rollers in a true position, and transfer it down the mill to the other operatives. When a log was on the center and rear blocks, and a slab fell to the live rollers, the head block would at that instant be twelve feet further from the head sawyer than would the forward end of the slab. At the time of the accident causing respondent's injuries, a slab in some unknown manner assumed a somewhat angling position on the rollers, and when the head sawyer caused the carriage to rapidly return or "gig back," the front head block collided with the slab and caused it to return towards the saw, where it struck and injured respondent.

The appellant first contends that the trial court erred in denying its motion for a nonsuit, its challenge to the sufficiency of the evidence, and its motion for a new trial. In support of these assignments, it insists that respondent's primary duty was to look after the moving slab until it had safely met and passed the front head block of the returning carriage; that his other duties were secondary; that the slab was under his sole control; that the band saw revolved at a terrific rate of speed; that if the returning carriage should strike and drive the slab against it, the resulting effect might seriously damage the saw or injure appellant's employees, and that respondent was guilty of gross negligence

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in turning his back towards the slab before it had safely met and passed the front head block of the returning carriage.

While it is true that the duty devolved upon respondent to operate the live rollers and see that the slab so moved thereon as to safely pass the returning head block, he also had to perform other important duties hereinafter mentioned. The evidence shows that, at the time of the accident, appellant was sawing a short log which rested on the rear and middle blocks; that extra danger attended the sawing of a log so placed, as the front head block which would stop beyond the slab might strike it when returning; that respondent had been instructed to watch for and remove slivers liable to obstruct the saw; that he had to do so before the carriage had returned; that it was his further duty to keep the rollers free from bark and sawdust, also to operate a guard which protected the saw; that these duties frequently caused his attention to be diverted from the moving slab; that at the time he was injured he had his back towards the slab and carriage; that he was a minor not quite nineteen years of age; that he had worked as offbearer only about three days, although he had previously worked for some time in the mill in other capacities, and that the head sawyer had instructed him to perform all these duties.

Respondent testified that he had started the slab down the rollers in a true and safe manner, as he believed; that he was looking in the opposite direction towards the sawyer, and that he could not remember just how he was employed at the instant when the plank struck him. One Gustafson, another employee, located some distance down the mill, but with respondent in his view, testified that at the time the respondent was struck he was attempting to remove a splinter from in front of the saw, which duty caused him to turn away from the slab and carriage. The evidence shows that, when the log was being sawed, the carriage moved about as rapidly as a man would walk, but that when it returned, or "gigged back," it moved about as rapidly as a man

could run. At the instant when the cut had been completed and the slab had fallen to the rollers, the front head block was about twelve feet ahead of the front end of the slab, and nearly twenty-five feet from the saw. The slab would then start down the rollers as rapidly as a man could walk, and the carriage would "gig back" as rapidly as he could run.

As above stated, there was evidence to show that the respondent's duty required him to remove splinters which had fallen in front of the saw, and to do so before the carriage returned. His contention is that the head sawyer should have kept a lookout for these splinters, and should also have observed the relative positions of the receding slab and returning head block so that he might stop the carriage when necessary to avoid any threatened danger; that without doing so, he caused the carriage to return so rapidly and violently that it struck the slab and drove it against respondent while he, in the performance of one of his duties, was in a place of danger; that the head sawyer was therefore guilty of negligence; that he was at the time a vice principal, performing the nondelegable duty of his master, and that appellant is liable. Appellant, however, contends that it was not the head sawyer's duty to watch the course of the slab moving down the rollers; that such duty devolved solely upon respondent; that respondent was guilty of contributory negligence; that he assumed the risk of the necessary dangers attending his employment; that if the head sawyer was in any manner negligent, his negligence was that of a fellow servant, and that respondent is not entitled to recover. Upon all the evidence, which was conflicting, and which we have carefully considered, we conclude that these various contentions raised issues of fact, which were properly submitted to the jury, and that we would not be justified in disturbing their verdict.

If it was not the head sawyer's duty to observe the relative positions of the receding plank and returning carriage, or to watch for splinters, which would endanger the saw, and which

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respondent was instructed to remove, and if at the same time respondent was obliged to perform all the duties required of him, some of them hazardous, such a condition would instigate the suggestion that the appellant was negligent in failing to provide the respondent with a reasonably safe place in which to work. Although the respondent seems to have been a very intelligent young man, he had only three days' experience in the performance of his duties, and we cannot hold, as a matter of law, that he assumed the dangers of his employment, in the face of evidence which makes it at least questionable whether the appellant had fully discharged its duty in providing him a reasonably safe place in which to work. There was just as much, if not more, reason for imposing extra duties upon the head sawyer, than there was for imposing them upon the respondent. The head sawyer himself advised and directed the respondent as to the nature and performance of his duties. When the respondent, in the performance of one of them, was in a position of danger, was removing a splinter, as stated by Gustafson, and according to respondent's evidence was entitled to rely upon the head sawyer to so control the movements of the carriage as to protect him and avoid accident, it was certainly for the jury to determine whether the head sawyer, who was for such purposes appellant's vice principal, was negligent in causing the violent return of the carriage, and whether appellant was negligent in failing to provide the respondent with a reasonably safe place in which to work. Without further discussion of the evidence, which was conflicting, and all of which we have carefully considered, we state our conclusion that the motion for a nonsuit, the challenge to the sufficiency of the evidence, and the motion for a new trial, were properly denied.

Some assignments of error are based upon the admission and rejection of evidence. Without entering upon a detailed discussion of these assignments, which we have carefully considered, we hold that no prejudicial error was committed in

this regard. The manner in which appellant has prepared its brief, and presented this appeal, convinces us that its main reliance for a reversal and dismissal is predicated upon the alleged insufficiency of the evidence to sustain the verdict.

Appellant has also presented other assignments of error, based upon instructions given, and requested instructions refused. Its contention that an instruction on the question of contributory negligence was indefinite, incomplete, and misleading, is without merit, as that issue was properly covered by other instructions given. The same observation is pertinent to the appellant's other objections. Although particular instructions to which our attention has been directed might be subject to some criticism when separately considered, we think the entire body of the instructions fully and correctly stated the law pertinent to all the issues of this case.

We find no prejudicial error in the record. The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, and FULLERTON, JJ., concur.

CHADWICK, GOSE, MORRIS, and PARKER, JJ., took no part.

[No. 7584. Decided May 15, 1909.]

F. W. BURDICK *et al.*, Appellants, v. GEORGE W. KIMBALL *et al.*, Respondents.¹

TAXATION—SALE OF PROPERTY—REDEMPTION—BY "MINOR HEIRS"—STATUTES—CONSTRUCTION. LAWS 1899, p. 298, permitting any "minor heir" to redeem land sold for taxes does not apply to a minor for whom land had been deeded in trust and who had not inherited the property, as the statute is clear, and the history of the act shows "heirs" to have been advisedly used in order to limit the right to redeem to those who take by descent (Per Mount, J., with whom Crow, Dunbar, and Parker, JJ., concur; Chadwick, J., dissenting, with whom Rudkin, C. J., Fullerton, and Gose, JJ., concur).

SAME—TITLE IN TRUSTEE—REDEMPTION BY MINOR CESTUI QUE TRUST. Where the full legal title to land is in a trustee for a minor,

¹Reported in 101 Pac. 845.

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Opinion Per MOUNT, J.

the minor cannot redeem the land from tax sale under Laws 1899, p. 298, his remedy being against the trustee (Per Chadwick, J., Rudkin, C. J., Fullerton, and Gose, JJ., concurring).

Appeal from a judgment of the superior court for King county, Morris, J., entered May 1, 1908, upon sustaining a demurrer to the complaint, dismissing an action to redeem real property from a tax sale. Affirmed.

Todd, Wilson & Thorgrimson, for appellants, contended that the statute is remedial and should be liberally construed. Cooley, Taxes, p. 532; Black, Tax Titles, p. 350; Black, Interpretation of Laws, p. 329; 26 Am. & Eng. Ency. Law (2d ed.), p. 676; *Dubois v. Hepburn*, 10 Peters 1, 9 L. Ed. 325; *Karr v. Washburn*, 56 Wis. 303, 14 N. W. 189; *Minnesota Debenture Co. v. Dean*, 85 Minn. 473, 89 N. W. 848. It is clear that the word "heir" was inadvertently used, and that the intent was to protect all minors, within general rules of interpretation. Black, Interpretation of Laws, pp. 35, 48, 60, 83, 87, 100, 104; 26 Am. & Eng. Ency. Law (2d ed.), pp. 597, 601, 602, 646, 648; Sutherland, Statutory Construction, §§ 237, 246, 253, 292; *Seattle v. Seattle & M. R. Co.*, 50 Wash. 132, 96 Pac. 958.

Frank S. Griffith and *Morris B. Sachs*, for respondents. The courts cannot depart from the meaning clearly conveyed by unambiguous words in a statute. 26 Am. & Eng. Ency. Law (2d ed.), p. 597; *Stevens v. Casady*, 59 Iowa 113, 12 N. W. 803; *Knipe v. Austin*, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531; *State ex rel. Chamberlin v. Daniels*, 17 Wash. 111, 49 Pac. 243; Sutherland, Statutory Construction, § 238; 4 Words & Phrases Judicially Defined, p. 3241. In any event the title was in the trustee. *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; *Thompson v. Price*, 37 Wash. 394, 79 Pac. 951.

MOUNT, J.—This action was brought to redeem certain real estate from a tax sale. The trial court sustained a de-

murrer to the complaint, and dismissed the action. Plaintiffs appeal.

The facts shown by the complaint are as follows: On June 30, 1893, the father and mother of the minor Bernhart Brant Bartels deeded the property in controversy to one E. M. Carr, in trust for the minor. The trust deed authorized the trustee to sell the property and convey an absolute title in fee, to change the form of the property at any time, and to invest the proceeds, "it being the intention of the said parties of the first part to give full power to said trustee to deal with the said property as his own, and imposing full confidence in his honesty and discretion in relation to said trust." This deed was duly recorded in King county, where the land is located. At the time the deed was made, taxes were due and unpaid for the years 1878 and 1893. Afterwards taxes were permitted to go delinquent for the years up to and including 1896. In May of 1898, the treasurer of King county issued a certificate of delinquency to one F. W. Comstock for these delinquent taxes. In March, 1901, Mr. Comstock brought an action in the superior court of King county to foreclose his certificate of delinquency. Personal service of summons and complaint in that action was made upon the trustee, in whose name the title stood. A judgment of foreclosure followed in due course, and the property was sold to Mr. Comstock, who afterwards deeded it to George W. Kimball. The minor, now nearly sixteen years of age, brings this action by his guardian and trustee. He alleged a tender of the amount of taxes, penalty, and interest due. No question is made upon the regularity of the tax foreclosure proceedings. The lower court sustained the demurrer, upon the ground that the minor, not having inherited the property, was not authorized by the statute to redeem it from tax foreclosure sale. This is the only question presented.

The statute relating to the subject is as follows:

"If the real property of any minor heir, or any insane person, be sold for nonpayment of taxes or assessments, the

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same may be redeemed at any time after sale and before the expiration of one year after such disability has been removed upon the terms specified in this section," etc. Laws 1899, p. 298; Pierce's Code, § 8696.

Appellants argue that the word "heir," as used in the statute, was used inadvertently by the legislature, and should be excluded, so that the statute would apply to all minors; that the statute, being remedial in its nature, should receive a liberal construction. We might readily agree to the last position, and also the first, if we were satisfied that the word "heir" had been used inadvertently, but

"When the meaning of a statute is clear, and its provisions are susceptible of but one interpretation, that sense must be accepted as the law; its consequences, if evil, can only be avoided by change of the law itself, to be effected by the legislature and not by judicial construction." Sutherland, Statutory Construction, § 238.

In order to determine whether the word "heir" was used inadvertently or not, it may be well to look to the history of this statute. In 1891, the legislature of this state passed an act relating to the assessment and collection of taxes, and there provided:

"Sec. 107. Minors, insane persons, idiots, or persons in captivity, or in any country with which the United States are at war, having an estate in or lien on lands sold for taxes, may redeem the same within two years after such disability shall cease." Laws 1891, p. 321.

At the next session of the legislature, in 1893, a new act relating to the same subject was passed, and prior acts were expressly repealed. Section 121, page 378, of this act provides:

"If the real property of any minor heir or insane person be sold for nonpayment of taxes or assessments the same may be redeemed at any time after sale and before the expiration of one year after such disability has been removed upon the terms specified in this section," etc.

It will be noticed that, in 1891, certain classes of persons might redeem; viz., minors, insane persons, idiots, persons in

captivity, or persons in a foreign country at war with the United States. These persons were required to redeem within two years after the disability should cease. The act of 1893 changed this provision, by limiting the time to within one year after the removal of the disability, and also making it apply only to minor heirs and insane persons, excluding idiots and persons in captivity and persons in a foreign country at war with the United States from the benefit of the provision. This section has since been amended or reenacted by the Laws of 1895, page 523; by the Laws of 1897, page 184; and, also, by the Laws of 1899, page 298. But the provision under consideration has not been changed in substance since its enactment in 1893. The change from minors, insane persons, idiots, and persons in captivity, to minor heirs and insane persons, is such a radical change that we cannot believe the legislative body made the change inadvertently. The fact that the word "heirs" was inserted after "minors" shows a clear intention to modify and limit the class of minors who might redeem from tax sale. There may be no good reason for permitting a minor to redeem property which he inherits, and refusing him the same right to property acquired by grant or purchase. The policy of the law rests entirely with the legislature. Courts may not declare the policy; they simply construe the law. As was said by this court in *Knipe v. Austin*, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531, in construing an act relating to mortgages:

"It may be that cases of hardship will arise under this law; but courts have nothing to do with the policy or impolicy, the justice or injustice of legislative enactments. The right to redeem at all is a right granted by the statute. Without a statutory enactment, the right would be cut off absolutely. It is a right that is purely *ex gratia*, and the legislature in conferring this right could confer it burdened with any conditions which it saw fit to impose."

This language is particularly applicable to the case at bar.

We are of the opinion that the lower court properly con-

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strued the statute in question, and the judgment must therefore be affirmed.

CROW, DUNBAR, and PARKER, JJ., concur.

CHADWICK, J. (concurring)—I concur in the result, but not on the grounds upon which the opinion of the majority rests. Whether in the form of the act of 1891 or in the form of the act of 1893, I believe that the intent of the legislature was to relieve all those under the legal disability of infancy, and not to except a class within a class. The strict construction adopted by the majority would permit a redemption by a minor who took by inheritance, and deny that benefit to one who took by will or by deed. It is true that a strict definition of the words employed would bear out the conclusion of the majority; but, aside from the considerations advanced by Judge Mount, there are other elements to be considered in the construction of statutes. The words employed should be construed in the light of the whole context of the law, its subject-matter, its effect and consequences, its spirit, and its reason. Of the effect and consequences, and the spirit and reason of a law, Blackstone says:

“As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. . . . But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it.”
1 Blackstone's Commentaries, p. 61.

It appears to me that, the reason of the law being to give the right of redemption to persons under a legal disability, it is immaterial how the property was acquired, and the consequences and reason of the law should not be disregarded in order to give effect to the use of a word. While it is true that the right of redemption is purely *ex gratia*, I am not willing to admit that the act under consideration limits the right to those who take by descent rather than by purchase. In the

case at bar, however, by the terms of the trust, Carr held the full legal and equitable title. There was no right or interest reserved to the minor that ran with the land. His relation was with his trustee and was personal. The terms of the trust are thus defined:

"The trustee shall have the power to change the form of the property at any and all times and to sell the same and to invest the proceeds of the same according to his discretion; to change the form of investment from time to time according to his discretion, and the sale or conveyance of the property, or any part thereof, made by him shall vest in the grantee absolute title in fee, unencumbered by any trust whatever, and no purchaser from the trustee of this property, or any part thereof, or of any property which may be acquired or held in trust hereunder, shall be required to look to the application which may be made by the trustee of the purchase money, and no purchaser of any of the above described property, or of any property in which the proceeds of any of the above described property may be vested, shall be under any responsibility whatever as to the application of the proceeds of any of the purchase price of any of said lands. It being the intention of the said parties of the first part to give full power to the said trustee to deal with the said property as his own and imposing full confidence in his honesty and discretion in relation to said trust."

Therefore, if Carr conveyed the land or allowed it to pass from him by operation of law, in abuse of his trust, the minor's remedy is against his trustee, and not against the one who has obtained it by a strict compliance with the law designed to promote the gathering of the public revenues. The case falls within the principle announced in the case of *Thompson v. Price*, 37 Wash. 394, 79 Pac. 951, and for that reason should be affirmed.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur with CHADWICK, J.

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[No. 7818. Decided May 15, 1909.]

A. S. JOHNSON, *Appellant*, v. GEORGE H. SEKOR *et al.*,
Respondents.¹

VENDOR AND PURCHASER—FORFEITURE OF CONTRACT—RIGHTS OF CREDITOR OF VENDEE—EXECUTION—PROPERTY SUBJECT TO LEVY. After due forfeiture of a contract to purchase lots for nonpayment of installments due, time being of the essence and title remaining in the vendor, a creditor of the vendee acquires no interest by the levy of execution and tender of the installments, there being no evidence of collusion between the vendor and vendee.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 18, 1908, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to subject real property to the lien of a judgment. Affirmed.

Lueders & Phelps, for appellant.

Emmett N. Parker, for respondent Gregory & Co.

MOUNT, J.—This action was brought to subject certain real estate to the lien of a judgment. After a trial to the court without a jury, the action was dismissed, and plaintiff appeals. The facts are as follows: The respondents E. F. Gregory and wife were the owners of lots 14 and 15, in block 5, of McKinley Park Addition to Tacoma, Pierce county, Washington. On December 9, 1904, respondent H. L. Cory entered into a written contract with Gregory and wife, agreeing to purchase these lots for \$240, to be paid, \$10 cash and \$7.50 per month. The contract contained the following provision:

“In case of the failure of the party of the second part to make either of the payments or perform any of the covenants on his part or to pay all taxes, assessments, and impositions before delinquency, this contract shall be forfeited and determined at the election of the said parties of

¹Reported in 101 Pac. 829.

the first part. But said parties shall not be obliged to give any notice to said second party of such election, and the said party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said parties of the first part in full satisfaction and liquidation of all damages by them sustained, and they shall have the right to reenter and take possession of said land and premises and every part thereof. It is mutually agreed that time is and shall be the essence of this contract."

Payments were made upon the contract substantially as agreed, until September, 1907. In the meantime, on April 26, 1905, the appellant obtained a judgment in the superior court of Pierce county against H. L. Cory, for \$456 and costs. After September, 1907, Cory made no further payments upon the contract for the purchase of the lots, on which contract there was then due \$22.95. He was requested upon different occasions by the agent of Mr. Gregory to complete his payments, but he refused to do so, saying he had been informed that if he acquired the title, appellant, on account of the judgment above named, would take the lots away from him.

On December 20, 1907, Mr. Cory, being three months in arrears in his payments, was notified that, unless he made his payments, his contract would be forfeited. He then stated that he was "not going to make any more payments on that contract," and was then told that the contract was at an end. On the next day Gregory and wife conveyed the property to E. F. Gregory & Co., a corporation, in which they were the principal stockholders. The lots were vacant and unoccupied lots during all the times herein mentioned. On December 28, 1907, the appellant, in supplemental proceedings in aid of the judgment against Cory, procured a temporary restraining order against the Gregorys, restraining them from conveying the lots. This restraining order was dissolved on January 14, 1908. On that same day the appellant caused an execution on the judgment of April, 1905, against Cory, to be levied upon the interest of Cory

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in the lots in question, and afterwards, in February, 1908, the said interest was sold and bid in by the appellant. On February 21, appellant made a tender of \$23.50 in payment of the balance due on the contract between Cory and Gregory and wife, which the latter refused.

It is plain under these facts, which are undisputed, that the appellant has no interest in the property. The title never was conveyed to Cory. He did not have possession. He had a contract for purchase merely. This contract provided that time was of the essence of it and, if payments were not made as agreed, it might be forfeited without notice. It was forfeited after notice for failure to perform by Cory. At the time of its forfeiture, Cory was notified and declined to finish the payments. The interest of the judgment creditor was no greater than that of the judgment debtor. No levy was made upon the lots or of Cory's interest therein while the contract was alive and capable of being enforced. Appellant waited until after the contract was forfeited and Cory's interest gone before he attempted to levy upon the property. After forfeiture, Cory himself could not restore his interest without the consent of the other party to the contract, and it follows, of course, that one holding under Cory could not do so.

Even if the rule is as contended for by appellant, that a judgment creditor has a lien on the equitable estate of the judgment debtor, such lien would cease when the equity ceased. In this case the equitable estate of Cory in these lots depended on the life of the contract of purchase. It was liable to forfeiture upon nonperformance. The forfeiture as to him meant a forfeiture as to all claiming through him. Otherwise the contract would be of no avail to the seller for whose benefit this clause was inserted. The tender made by the appellant after forfeiture could not reinstate the contract any more than a tender by Mr. Cory, and was therefore of no avail.

It is suggested by appellant that there was collusion be-

tween Cory and Gregory, and that the contract was forfeited on that account. We think there is not sufficient in the evidence to show such fact. When payments were in arrears, Mr. Gregory's agent insisted on payment and notified Cory several times to pay, and was finally told that the reason payment was not made was that Cory believed the lots would be taken away from him by the appellant, and that he did not propose to put anything more into them. The contract was clearly subject to forfeiture, and was afterwards declared forfeited.

We think the trial court properly dismissed the action, and the judgment must therefore be affirmed.

RUDKIN, C. J., GOSE, FULLERTON, CHADWICK, and CROW, JJ., concur.

PARKER, J., having been of counsel, took no part.

[No. 7411. Decided May 18, 1909.]

T. H. BELLINGHAM, *Respondent*, v. JOHN W. LINCK *et al.*,
Appellants.¹

APPEARANCE—PROCESS—WAIVER OF DEFECTS IN SUMMONS. An objection as to the sufficiency of the summons is waived by a general appearance or voluntarily pleading to the merits and going to trial without saving a special appearance.

MECHANICS' LIENS—NOTICE—NONLIENABLE ITEMS—EFFECT. Including in a lien notice in good faith an item of \$18 paid for water connections incident to the plumbing work, does not render the lien void as to other items, even if that item was nonlienable.

PLEADING—BILL OF PARTICULARS—MAKING MORE SPECIFIC—MECHANICS' LIENS. It is not an abuse of discretion to deny a motion to make a bill of particulars more specific in an action to foreclose a mechanics' lien, by setting out the names of all persons who labored on the building, in order that defendant may secure their evidence.

TRIAL—APPEAL—DISCRETION—EVIDENCE—ORDER OF ADMISSION. A case will not be reversed for allowing evidence in rebuttal that plain-

¹Reported in 101 Pac. 843.

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tiff might have introduced in chief, except on the plainest abuse of discretion, and where there was no refusal to allow evidence in reply thereto.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 28, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

F. Campbell, T. L. Stiles, and E. L. Culver, for appellants.

Marshall K. Snell and Bertha M. Snell, for respondent.

PARKER, J.—This is an action to foreclose a lien for material and labor furnished in plumbing a building of the defendants in Tacoma. A trial of the cause upon the merits resulted in findings and judgment in favor of the plaintiff and against the defendants for the sum of \$396.10, which, less \$18, was decreed to be a lien upon the property of defendants. We will notice the facts so far as necessary in connection with each error discussed.

Counsel for appellants contend that the summons shows a fatal defect upon its face, in that it did not state any place for the service of the defendants' answer or other pleadings. This contention seems to be based upon the assumption that a motion to quash the summons was seasonably made in the court below. But we find no such motion or ruling of the court thereon in the record. Should we treat this contention as an objection to the sufficiency of the summons made direct to this court, rather than as an alleged error of the lower court, then, in the light of the record, it is plain that defendants waived all defects in the summons as well as service thereof by a general appearance and answering upon the merits before making any such objection. If the defect in the summons is of such seriousness that it could be regarded as jurisdictional, it would, in any event, present only the question of jurisdiction over the persons of the defend-

ants, and not over the subject-matter; hence, could be, and was waived by defendants, by voluntarily pleading and going to trial upon the merits. *Meigs v. Keach*, 1 W. T. 306; *Wagnitz v. Ritter*, 31 Wash. 343, 71 Pac. 1035; *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497. Such defects in process are waived by answering upon the merits, even after special appearance and motion to quash, unless the special appearance is preserved. *Walters v. Field*, 29 Wash. 558, 70 Pac. 66; *Larsen v. Allan Line Steamship Co.*, 37 Wash. 555, 80 Pac. 181, 9 L. R. A. (N. S.) 1258; *Gaffner v. Johnson*, 39 Wash. 437, 81 Pac. 859.

It is contended that the insertion in the lien notice filed in the auditor's office, of certain nonlienable items, rendered the notice of no effect as a basis for this foreclosure. The trial court found that \$18 of the amount claimed had been paid by the plaintiff to the city in securing water connections for the property, which did not constitute material or labor forming part of the building, and concluded that the property was not subject to lien therefor; but also found that it was expended by plaintiff for the benefit of defendants; that it was necessary expense incident to the plumbing; that it was done at the request of the defendants; that it was included in the lien notice in good faith, and defendants were not injured thereby; all of which seems to be clearly shown by the evidence. This item was included in the personal judgment rendered against the defendants, but not in the amount decreed as a lien upon the property. Even if this is not a lienable item, we are of the opinion that the lien upon the property for the value of the other work and material was not impaired by the insertion of it in the notice. *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Maris v. Clevenger*, 29 Wash. 395, 69 Pac. 1089; *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721; *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106.

Defendants motion to require plaintiff to make his bill of particulars, which had been furnished upon demand, more

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specific, was denied by the court, which is now claimed as error. The bill is an itemized statement of the material and labor furnished, showing the amount claimed for each item of material, and the labor claim is in one item. In their motion defendants asked that plaintiff be required to make this item more specific by setting out the names of all the men who worked upon the house, the number of days each man worked, and the wages paid each man. The purpose of defendants in asking this information is clearly stated in their argument as follows: "Defendants were entitled to this so they could bring those persons into court and get the benefit of their testimony." We do not regard that the purpose or office of a bill of particulars is to disclose evidence upon which plaintiff relies for recovery, nor to furnish defendants with evidence or names of witnesses for defense. *Blackburn v. Washington Gold Min. Co.*, 19 Wash. 361, 58 Pac. 369; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34; 3 Ency. Plead. & Prac., p. 520. As to when a bill of particulars should be required of a party to an action, and as to what extent it should descend into details, when required, are matters resting largely in the discretion of the trial court. It is plain the court did not abuse its discretion in this case when it denied defendants' motion. *Ferry v. King County*, 2 Wash. 344, 26 Pac. 539; *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. 883; 3 Ency. Plead. & Prac., pp. 524, 536.

After the close of the evidence for the defense, the court permitted plaintiff, over the objection of defendants' counsel to introduce evidence which they claim was not admissible in rebuttal, but was in effect only cumulative and upon plaintiff's original case, which is now claimed as error. There is plausibility in the argument of respondent's counsel that, in view of the affirmative matter pleaded in the answer, this evidence was in any event admissible. However, we prefer to dispose of the question on the broader ground that it was a matter within the discretion of the trial court, and only

the plainest abuse of that discretion showing prejudice to the rights of the defendants would call for correction from this court. It does not appear that defendants offered or desired to produce further evidence to meet this additional evidence of the plaintiff. They were evidently in no worse condition than as if this evidence had been offered in plaintiff's original case. If they were, and had offered evidence in reply thereto, and the court had refused such offer, there might be prejudicial error. 1 Thompson, Trials, §§ 346, 347; *Cogswell v. West St. & N. E. Elec. R. Co.*, 5 Wash. 46, 31 Pac. 411; *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642; *Bergman v. London & Lancashire Fire Ins. Co.*, 34 Wash. 398, 75 Pac. 989.

The contention made by appellants' counsel that the evidence does not support the court's findings as to the amount and value of the material and labor, and, also, that the evidence shows they were damaged by reason of delay in performance of the contract, and for that reason were entitled to reduction in price, present only questions of fact on which there is some conflict of evidence. We have carefully reviewed the whole of the evidence, and conclude that we are not warranted in disturbing the court's findings of fact upon these questions.

The foregoing disposes of all the matters which we regard as of sufficient importance for our review. We are of the opinion that the record does not show any error on the part of the learned trial court, and that its judgment and decree should be affirmed. It is so ordered.

ALL CONCUR.

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[No. 7867. Department One. May 18, 1909.]

DAVID STEWART, *Respondent*, v. THE CITY OF CHEHALIS,
Appellant.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—BASIS—BENEFITS. A municipal assessment for sewer purposes is to be based upon benefits received, under Laws 1907, chapter 70, and not upon the last general assessment for city purposes, under Laws 1903, ch. 27, which is superseded.

SAME—HEARING—ADJOURNMENTS—STATUTES—APPLICATION. The hearing on an assessment for sewers, levied under the act of March 27, 1890 (Laws 1890, p. 131, Bal. Code, § 943), may be continued for more than four weeks; since Bal. Code, § 1096, prohibiting continuance for such length of time applies only to the act of March 10, 1891 (Laws 1891, p. 406), relating to drainage by cities of the second, third, and fourth classes.

SAME—ASSESSMENTS FOR BENEFITS—VALIDITY—FINDING—SUFFICIENCY. A finding that a sewer was constructed almost solely for the benefit of a hospital "and was not intended or expected to benefit, nor did it prove of any benefit to the said premises of the plaintiff up to the time of the trial," is insufficient to defeat the assessment on the ground that it was not made according to benefits to the property.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered July 3, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to annul a local improvement assessment and to enjoin its enforcement. Reversed.

G. E. Hamaker (*Forney & Ponder*, of counsel), for appellant.

W. A. Reynolds, for respondent.

RUDKIN, C. J.—This action was instituted by the plaintiff to annul a local improvement assessment for sewer purposes, and to enjoin and restrain the defendant city and its officers from taking any steps for its enforcement. On the 23d day of December, 1907, the county assessor of Lewis

¹Reported in 101 Pac. 841.

county, by direction of the city council of the defendant city, prepared and filed an assessment roll for the district, based on "the last general assessment of the land, *exclusive of improvements*, within said district for city purposes," as prescribed by chapter 27 of the Laws of 1903. According to this assessment roll, the nine lots owned by the plaintiff were valued at \$200, and an aggregate assessment of \$196.79 was imposed against them. The city council fixed January 6, 1908, as the date for hearing objections to the assessment roll, and notice of such hearing was duly published by the city clerk. The hearing was adjourned from time to time, until February 6, 1908, at which time the city council revised the roll and increased the aggregate assessment against the property of the plaintiff from \$196.79 to \$251.51. The court below held that the assessment was void, and gave judgment according to the prayer of the complaint. From this judgment, the city has appealed.

The cause comes before us for review on the findings of fact, conclusions of law, and decree, and to these we must look for error in the judgment. The conclusions of law assign three reasons for the invalidity of the assessment, and if these conclusions are erroneous, the judgment must be reversed, as there is no other ground upon which it can be sustained. The first conclusion of law was that the assessment was void because not based on the last general assessment for city purposes, as required by chapter 27 of the Laws of 1903. In the case of *Seattle Cedar Lumber Mfg. Co. v. Ballard*, 50 Wash. 123, 96 Pac. 956, we held that chapter 127 of the Laws of 1903 superseded chapter 27 of the Laws of 1903, enacted at the same session, as well as all prior laws on that subject, so that the first conclusion of law was erroneous, and this much the respondent concedes. Since the decision in the *Ballard* case, chapter 127 of the Laws of 1903 has been again superseded by chapter 70 of the Laws of 1907, under which the assessment in controversy was, or should have been, imposed, but the latter act does not change the act of 1903

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in so far as the question under discussion is concerned. Under both chapter 127 of the Laws of 1903 and chapter 70 of the Laws of 1907, the assessment is based upon benefits and not upon the assessed valuation.

The next contention is that the city council lost jurisdiction by continuing the hearing on the assessment roll from January 6 to February 6, under Bal. Code, § 1096 (P. C. § 3667), which provides that the time for hearing objections to the assessment roll in certain cases may be adjourned not exceeding in all four weeks. Reference to the session laws will show that Bal. Code, § 1096, is § 7 of the act of March 10, 1891 (Laws of 1891, p. 406), entitled "An act to provide for the drainage of cities of the second, third, and fourth classes by the construction of sewers and drains." The assessment involved in this case was imposed under § 1 of the act of March 5, 1907 (Laws of 1907, p. 114), amending § 1 of the act of March 16, 1903 (Laws of 1903, p. 231), which in turn amended § 124 of the act of March 27, 1890 (Laws of 1889-90, p. 131; or Bal. Code, § 943; P. C. § 3495). It will thus be seen that Bal. Code, § 1096, only relates to assessments levied under a particular act, and has no application to assessments levied under § 124 of the act of 1890, *supra*, or the several acts amendatory of that section. The conclusion that the city council lost jurisdiction by adjourning the hearing on the assessment roll for more than four weeks was, therefore, erroneous.

The only other objection urged against the assessment was based on the following finding of the court:

"That on or about the 21st day of October, 1907, the city council of the said city undertook to create a sewer district in said city, known and described as subsewer district No. 15, commencing on Alfred street near Cascade avenue in said city, and running from the place of beginning in an easterly and southerly direction on Alfred street, past the said premises of the plaintiff and what is known as the St. Helens hospital, which sewer was constructed almost solely for the use and benefit of said hospital, and was not intended or expected to

benefit nor did it prove of any benefit to the said premises of the plaintiff, up to the time of the trial, but the plaintiff with the majority of the property owners along the line of said sewer signed a petition, asking the city council of said city to provide for the location and construction of said sewer."

What was meant by the finding that the sewer had not proved of any benefit to the premises of the plaintiff up to the time of the trial is not entirely clear. The court may have concluded that there would be no benefit to the premises until the sewer was actually used in connection with the lots, and that the premises had not been connected with the sewer up to the time of the trial. But whatever may have been the court's conclusion or the reasons therefor, the finding is utterly insufficient to defeat the assessment. The law on the subject of special assessments for sewers is in a very unsatisfactory state. A reference to this and the *Ballard* case will show that the law relating to that subject has been changed at least eight times in seventeen years, and in many instances an act has been amended without the slightest reference to later conflicting acts on the same subject. It is little wonder, therefore, that courts and municipal officers find difficulty in determining what law shall apply to or govern in any individual case.

We are of the opinion, however, that the assessment in question was not void for any of the reasons assigned by the court or suggested by counsel, and the judgment is accordingly reversed, with directions to dismiss the action.

FULLERTON, CHADWICK, MORRIS, and GOSE, JJ., concur.

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[No. 8019. Department One. May 18, 1909.]

THE CITY OF TACOMA, *Respondent*, v. A. R. TITLOW *et al.*,
Appellants.¹

EMINENT DOMAIN—NECESSITY—DETERMINATION OF QUESTIONS—MUNICIPAL CORPORATIONS—NECESSITY FOR STREETS. Where a city has jurisdiction to extend its streets over tide lands, the decision of the proper municipal officers as to public use and necessity is conclusive, in the absence of fraud.

MUNICIPAL CORPORATIONS—STREETS—EXTENDING OVER TIDE LANDS OUTSIDE CITY. Where, pursuant to Const., art 15, § 1, harbor lines are established in front of a city the corporate limits of which only extend to the line of ordinary high tide, the city has power to extend its streets over intervening tide lands to and across the reserved area, as expressly authorized by Const. art 15, § 3.

MUNICIPAL CORPORATIONS—STREETS—CONDEMNATION OUTSIDE CITY—APPEAL—QUESTIONS PRESENTED—PAYMENT OF AWARD. Upon appeal from an order adjudging a public necessity for condemnation for a street extension outside of the city, the question of the power of the city to levy assessments on lands outside its limits to pay the award does not arise, as the award must be paid before the land is taken.

Appeal from an order of the superior court for Pierce county, Chapman, J., entered December 5, 1908, adjudging a public use and directing an assessment of damages in a condemnation proceeding, after a trial on the merits before the court. Affirmed.

A. R. Titlow and John M. Boyle, for appellants.

T. L. Stiles, F. R. Baker, and F. A. Latcham, for respondent.

RUDKIN, C. J.—This proceeding was instituted by the city of Tacoma, a municipal corporation of the first class, to condemn and appropriate a right of way over certain lands within and without its corporate limits, for the purpose of extending Sixth avenue, "west to the high land on the shore of Puget Sound, and thence by curving the said Sixth avenue from a point in lot 3, section 3, township 20, north, range 2

¹Reported in 101 Pac. 827.

east, to a point on the Inner Harbor line about midway between Wilton waterway and Day Island waterway." A portion of the land thus sought to be appropriated lies in block 132, Tacoma tide lands, owned by the appellants Titlow and wife. At the point on Puget Sound where the proposed street terminates, the city limits only extend to the line of ordinary high tide, so that tide land block 132 lies without the city limits, between the main land and the Inner Harbor line. The court below adjudged that the proposed use was a public use, and that public necessity demanded the prosecution of the enterprise, and ordered a jury impaneled to assess the damages. From this order the appellants Titlow and wife have appealed.

The first error assigned is the insufficiency of the evidence on the questions of public use and public necessity to support the order of condemnation as to the tide land lots in controversy. If the city of Tacoma had jurisdiction to extend its streets over these tide lands, the determination of the questions of public use and public necessity by the proper municipal officers is conclusive upon the courts in the absence of fraud. *Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192; *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *Adams County v. Schroeder*, 30 Wash. 703, 70 Pac. 1134; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256; *State ex rel. Pagett v. Superior Court*, 47 Wash. 11, 91 Pac. 241.

It is next contended that the city has no power to condemn lands for street purposes without its territorial limits. Section 1 of the act of March 13, 1907 (Laws 1907, p. 316), provides as follows:

"Every city of the first, second and third classes and other cities having a population of over fifteen hundred inhabitants within the State of Washington, is hereby authorized and empowered to condemn land and property, including state, county and school lands and property for streets, avenues, alleys, highways, bridges, approaches, culverts, drains, ditches, public squares, public markets, city and town halls,

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jails, and other public buildings, and for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley, or highway, and to damage any land or other property for any such purpose or for the purpose of making changes in the grade of any street, avenue, alley or highway, or for the construction of slopes or retaining walls for cuts and fills upon real property abutting on any street, avenue, alley or highway now ordered to be, or such as shall hereafter be ordered to be opened, extended, altered, straightened or graded, or for the purpose of draining swamps, marshes, tide lands, tide flats or ponds, or filling the same, within the limits of such city, and to condemn land or property, or to damage the same, either within or without the limits of such city for public parks, drives and boulevards, hospitals, pest houses, drains and sewers, garbage crematories and destructors and dumping grounds for the destruction, deposit or burial of dead animals, manure, dung, rubbish, and other offal, and for aqueducts, reservoirs, pumping stations and other structures for conveying into and through such city a fresh supply of water, and for the purpose of protecting such supply of fresh water from pollution, and to condemn land and other property and damage the same for any other public use after just compensation having been first made or paid into court for the owner in the manner prescribed by this act."

The only provision of this section that could warrant the appropriation of lands without the city limits are the words "for drives and boulevards" or "for any other public use." Laws conferring the right of eminent domain must be strictly construed, and municipal corporations cannot exercise such right without their corporate limits, in the absence of express legislative authority (*Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215) and it may well be that the street in question is neither a drive nor a boulevard within the purview of this statute, and that the general words "for any other public use," following specific enumeration of particular uses, do not confer the right, but this question we need not determine.

Section 1 of art. 15 of the constitution provides:

"The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish

harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The state shall never give, sell, or lease to any private person, corporation or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce."

Section 3 provides:

"Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided."

Under § 1 of this article, harbor lines must be located and established not only within, but in front of, the corporate limits of cities, and notwithstanding the fact that the limits of the city of Tacoma only extend to the line of ordinary high tide at this point, yet harbor lines were properly established in front of the city; and under § 3 of the above article, the city had power to extend its streets to the harbor area over the intervening tide lands. *Columbia & Puget Sound R. Co. v. Seattle*, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725; *Seattle v. Columbia & Puget Sound R. Co.*, 6 Wash. 379, 33 Pac. 1048; *Seattle & Montana R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *State ex rel. McKenzie v. Forrest*, 11 Wash. 227, 39 Pac. 684; *State ex rel. Bartlett v. Forrest*, 12 Wash. 483, 41 Pac. 194; *Ilwaco v. Ilwaco R. & Nav. Co.*, 17 Wash. 652, 50 Pac. 572.

Some question is raised as to the power of the city to levy assessments on land without its limits to pay the award in the condemnation proceedings, but, as said by this court in *Puyallup v. Lacey*, *supra*, that question does not arise in this case.

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Syllabus.

"Whatever damages are assessed in this proceeding must be paid by the city, before the property can be taken or damaged as in other cases."

In view of the conclusion we have reached on the merits of the case, we deem it unnecessary to discuss or consider the motion interposed at the hearing to dismiss the appeal on the ground that the order is not appealable.

Finding no error in the record, the judgment is affirmed.

CHADWICK, FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7589. Decided May 19, 1909.]

A. SNARSKI *et al.*, *Respondents*, v. WASHINGTON STATE
COLONIZATION COMPANY, *Appellant*.¹

APPEAL—REVIEW—WAIVER OF ERROR—THEORY OF TRIAL BELOW. The overruling of a demurrer to a complaint for rescission of a land contract and for damages, cannot be assigned as error so far as the action for damages is concerned, where the parties treated the action from the beginning as one in equity to rescind the contract and tried the case solely upon that theory.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—ACTIONS—OFFER OF POSSESSION. An action by a vendee to rescind a sale of land, does not fail because the plaintiffs did not offer to give up possession, where they tendered a quitclaim deed to the defendants and brought it into court.

SAME—DAMAGES—RENTS PRIOR TO RESCISSION. In an action to rescind a sale of land for failure of title, the vendees are not liable for rents for use of the premises while in possession, and the same cannot be deducted from their damages.

SAME—MEASURE OF DAMAGES—IMPROVEMENTS BY VENDEE. In an action to rescind a sale of land for failure of title, the measure of damages is the purchase price paid, with interest from the date of payment, and the reasonable value of improvements placed on the land by the vendees before they learned of the defective title, where the vendor represented that the title was clear and knew that the vendees intended to improve the property.

¹Reported in 101 Pac. 839.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 1, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, after a trial on the merits, in an action to rescind a contract for the sale of real property. Affirmed.

J. B. Bridges, for appellant.

J. C. Cross (*A. Emerson Cross*, of counsel), for respondents.

MOUNT, J.—This action was brought by the respondents to rescind a contract of sale of real estate, and to recover damages on account of the failure of appellant to convey to the respondents a good title. The case was tried to the court and a jury, and the result was a judgment of rescission, and for a return of the money paid, and damages, amounting altogether to the sum of \$634.50. Defendant has appealed. It alleges that the court erred, (1) in overruling a general demurrer to the complaint; (2) in not granting appellant's motion for judgment on the pleadings and facts proven; and (3) in certain instructions to the jury.

The complaint alleges, in substance, that, in March, 1906, the defendant agreed to sell to plaintiffs a certain forty-acre tract of land in Chehalis county, for the sum of \$400; that fifty dollars was paid in cash by the plaintiffs, fifty dollars was credited on account of railway fares from New York to Aberdeen, and two hundred and fifty dollars was to be paid on April 19, 1906, and the remaining fifty dollars was to be paid on April 19, 1907; that, upon final payment being made, the defendant agreed to convey the property to the plaintiffs in fee, clear of all reservations and conditions; that the plaintiffs went into immediate possession of the land and made the payments as agreed, and improved the land by clearing and erecting buildings thereon; that in November, 1906, plaintiffs notified the defendant that they were ready to pay the balance due, and thereupon defendant furnished to plain-

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tiffs an abstract of title which showed that the defendant could not convey a clear title; that thereafter the plaintiffs tendered the balance due and demanded a good title, which was refused them; that thereupon and before bringing this action, plaintiffs tendered to the defendant a quitclaim deed of the property, and demanded a return of the money paid and damages in the sum of \$1,600. Said deed was brought into court and filed to abide the judgment of the court in the case. The prayer of the complaint was for \$2,000 and "such other and further relief as to the court may seem right."

The appellant argues that the general demurrer to the complaint should have been sustained, for the reason that the action is a mixed action at law for damages and at the same time an action in equity to rescind the contract, and that, inasmuch as the plaintiffs remained in possession of the land, they could not maintain the latter action. So far as the demurrer is concerned, we need not consider the complaint upon the facts alleged which might sustain an action at law for damages for failure to perform the contract, because the parties treated the action from the beginning as one in equity to rescind the contract, and the case was tried solely upon that theory. The complaint seems to state a cause of action for rescission and for damages, beyond question. The form is of no consequence, under our liberal statute which requires a plain and concise statement of the facts. While the complaint did not in so many words allege an offer of possession to appellant, it did allege that the respondents offered to make a quitclaim deed back to the appellant prior to the suit, and such deed was filed with the case. This deed relinquished all the claim of the respondents to the land and improvements, which we think was all that was necessary. It was equivalent to an offer of possession. The legal title had not been conveyed to the respondents. The respondents had placed valuable improvements upon the land, which improvements, of course, followed the land, and respondents were entitled to pay therefor before delivery thereof to the appellant.

The rule is stated in 24 Am. & Eng. Ency. Law (2d ed.), at page 621, as follows:

“Whether the complaint in a suit for rescission must, as a condition precedent to relief, have offered or tendered restitution to the defendant prior to the bringing of the suit, is a matter upon which the authorities are conflicting. The rule of the better considered cases is, that it is sufficient that the plaintiff makes his offer to restore or to do equity, in his bill or complaint, and shows therein that he has substantially preserved the *status quo* on his part so as to be able to fulfill his offer. This rule proceeds upon the principle that it is always within the power of a court of equity to require that the person invoking its aid shall submit to equitable terms as a condition of relief, and that the parties being properly before the court, the court may impose upon them any terms which may be just and equitable in the premises, and may enforce compliance therewith.”

As a matter of fact, the trial court in this case followed this rule in entering his decree herein. It follows that the court properly overruled the general demurrer and denied the motion for judgment on the pleadings.

It is also claimed by the appellant that the respondents failed to show that there was any agreement for clear title free of conditions and restrictions; but the court and the jury found otherwise upon ample evidence, and we need not further pursue that question.

The court instructed the jury as follows:

“I also instruct you that, under the conditions in this case, that in case you find the plaintiff entitled to recover damages, that the defendant would be entitled to have deducted from the amount of that damage the rental value of the property during the time he occupied it. The rental value you are to take into consideration is the rental value of the property as the property was when he went there; not the rental value of it with the improvements upon it, which he has put there, but simply the rental value as it was when he went there and not after.”

Appellant insists that this instruction is erroneous because, if the respondents receive pay for their improvements,

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they should also pay rent for the use thereof. But this is not the rule in this class of cases. The respondents here were not in possession as tenants. They came into possession under a contract of sale, and were therefore not liable for rents for the use of the premises. *Ankeny v. Clark*, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. Ed. 475. If there was error in this instruction it was in favor of the appellant, and therefore it cannot complain.

Appellant also argues that the court erred in instructing the jury upon the measure of damages as follows:

"Now if you find that he is entitled to recover in the action, he would be entitled to recover back the purchase price he has paid, together with interest thereon at the rate of six per cent from the date of payment until the present time. He would also be entitled to recover for the reasonable value of the improvements that he has put upon the premises,"

after taking possession and before learning of the defective title.

It is argued that the part of the instruction relating to the improvements is erroneous. We think the rule applied here was proper. The appellant had represented that it could and would convey a clear title. It knew, or should have known, the condition of the title, and also knew that respondents purchased the land intending to make improvements upon it. This case in this respect is like the case of *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880, where we held, at page 480, that recovery for improvements is proper in such cases.

We find no reversible error. The judgment must therefore be affirmed.

RUDKIN, C. J., CROW, FULLERTON, and CHADWICK, JJ., concur.

GOSE, DUNBAR, MORRIS, and PARKER, JJ., took no part.

[No. 7986. Department One. May 19, 1909.]

HENRY STOCK *et al.*, *Respondents*, v. THE CITY OF TACOMA,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—SIDEWALK WITHOUT RAILING—INSTRUCTIONS. In an action against a city for injuries sustained in a fall in the street on a night which plaintiff had said was "so dark she could not see where she was going," it is not error to refuse an instruction based on that expression and making plaintiff guilty of contributory negligence as a matter of law if she voluntarily went into a dangerous place under such conditions, where there was other evidence as to the intensity of the darkness making that a question for the jury.

SAME—CONTRIBUTORY NEGLIGENCE—KNOWN DANGER. Where the city maintains a walk along a bulkhead without guard rail or light, a pedestrian familiar with the conditions is not guilty of contributory negligence as a matter of law in walking thereon upon a dark night when she might have avoided the danger by taking a safer way.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered September 19, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, after a trial on the merits, in an action for personal injuries. Affirmed.

T. L. Stiles, F. R. Baker, and F. A. Latcham, for appellant, cited, among other cases: *Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439; *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256, 2 Am. St. 164; *Town of Earlville v. Carter*, 6 Ill. App. 421; *City of Macomb v. Smithers*, 6 Ill. App. 470; *City of Rock Island v. Carlin*, 44 Ill. App. 610; *Knight v. Baltimore*, 97 Md. 647, 55 Atl. 388; *Howey v. Fisher*, 122 Mich. 43, 80 N. W. 1004; *Walker v. Reidsville*, 96 N. C. 382, 2 S. E. 74; 5 Thompson, Negligence (2d ed.), p. 733; *District of Columbia v. Brewer*, 7 App. D. C. 113; *Mosheuvel v. District of Columbia*, 17 App. D. C. 401; *Cook v. Atlanta*, 94 Ga. 613, 19 S. E. 987; *Rome v. Baker*, 107 Ga. 347, 33 S. E. 406; *Chicago v. Hogan*, 59 Ill. App.

¹Reported in 101 Pac. 830.

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446; *Clayton v. Brooks*, 150 Ill. 97, 37 N. E. 574; *Centralia v. Krouse*, 64 Ill. 19; *Hartman v. Muscatine*, 70 Iowa 511, 30 N. W. 859; *McGinty v. Keokuk*, 66 Iowa 725, 24 N. W. 506; *Wilson v. Charlestown*, 8 Allen 137, 85 Am. Dec. 693; *Irion v. Saginaw*, 120 Mich. 295, 79 N. W. 572; *Wright v. St. Cloud*, 54 Minn. 94, 55 N. W. 819; *City of Meridian v. Hyde* (Miss.), 11 South, 108; *Boyd v. Springfield*, 62 Mo. App. 456; *Cohn v. Kansas City*, 108 Mo. 387, 18 S. W. 973; *Durkin v. Troy*, 61 Barb. 437; *Wood v. Village of Andes*, 11 Hun. 543; *Neal v. Marion*, 129 N. C. 345, 40 S. E. 116; *Schaefer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533.

Goonor Teats, *Hugo Metzler*, and *Leo Teats*, for respondents.

CHADWICK, J.—The plaintiff Lottie Stock lived on the west side of the alley, between C and D streets, in the city of Tacoma. The alley was twenty-eight feet wide, with residences on either side for some distance north and south of the place where plaintiff lived. It was graded but not paved. Along the east side of the alley, opposite plaintiff's home, there was a bulkhead about eighty-eight feet long and four or five feet high, along which an unguarded walk was maintained or permitted by the city. There was also a walk along the west side of the alley. At about ten o'clock on the evening of March 30, 1908, the plaintiff left her home to post a letter. She crossed the alley and followed the walk a short distance, intending to leave the walk and cut across lots by way of a traveled path to D street. She fell from the unguarded walk, over the bulkhead, and was injured. The night was so dark that, as plaintiff says, she could not "see where she was going." The path she was intending to follow was well known to her, having been used for some time, not only by plaintiff but by those resident in the immediate neighborhood. Plaintiff, her husband joining, brought this action and recovered a judgment in the court below, from which the city has appealed.

The first error assigned is the refusal of the court to give the following instruction to the jury:

"You may take into consideration the knowledge of the plaintiff as to the place where she was injured. If she had knowledge of the condition of the alley at the time and place of her injury, and went voluntarily into what she knew to be a dangerous place when it was so dark she could not see where she was going, she was guilty of such contributory negligence as would prevent a recovery of damages and your verdict must be for the defendant."

The court gave the following instruction:

"You will take into consideration, if you find from the evidence that it is true, that the lady knew of the condition there, that there was an off-set there, and no guard rail; that is a matter you have a right to take into consideration in determining whether or not the lady was guilty of contributory negligence in passing along that side of the alley way in the darkness. As I say, it is not negligence as a matter of law to walk along a highway that is built above the surroundings in the night time, even if it is intensely dark."

It is insisted that the instruction given by the court did not cover the exact principle aimed at in the requested instruction and to which defendant was entitled; that the words "intensely dark," as used by the court "leave room for speculation on the part of the jury as to the intensity of the darkness, and that jurors might well be expected to arrive at other conclusions than they would if instructed as to the true condition that existed at the time of the accident." We do not see in what way defendant could have been prejudiced by the instruction of the court. As we view this case the degree of darkness was properly a question of fact to be resolved by the jury in making its findings on the question of contributory negligence. Nor do we think respondent should be concluded by her answer that it was so dark she could not see, when taken, as it was taken by the jury, in connection with all the facts and circumstances surrounding the accident. She had used other expressions that would warrant the jury in

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finding that, while it was not a night "all white and still," it was nevertheless not a night so dark that pedestrians should be precluded from following the highways provided by the city. The expression, "so dark I couldn't see anything" is a mild exaggeration indulged by all men and understood by jurors. We think there was no error in the refusal of the court to give the requested instruction.

The real question in this case is raised by the second assignment of error. Appellant contends that this case falls within the principle announced in 5 Thompson on Negligence, § 6273:

"One who, with full knowledge of the defective condition of a sidewalk, crosswalk, or roadway, and of the risks incident to its use, voluntarily attempts to travel upon it, when the defect can easily and without substantial inconvenience *be avoided by going around it* or taking a safer way, is not in the exercise of reasonable care, but *assumes the risk*, and cannot recover damages from the city for any resulting injury."

In support of this rule appellant cites many authorities, some of which sustain its contention upon facts almost identical with those here presented. The principle there announced should not, however, be or have been extended to cover a case like the one at bar. As originally announced and properly applied, it governs only those cases where an unusual condition exists; as, for instance, icy or slippery sidewalks, sidewalks or streets in course of repair, or unusual obstructions in the way of pedestrians. Here we have a known condition, a walk made by the city along a bulkhead, without guard rail or light to secure the pedestrian; itself an invitation to travel by night as well as by day. Continuing the text, the writer says:

"On the other hand, there are decisions to the effect that the fact that there was a safer way than the regular and direct way, is not conclusive proof that the plaintiff did not exercise due care, although, with such knowledge, he chose the unsafe course; but the question will be *for the jury*."

In the early case of *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799, a case in its facts most like this one, this court said:

"The mere fact that the appellant was aware of the defective condition of the sidewalk when the accident occurred is not *per se* conclusive of negligence on his part, though it was competent evidence on the question of contributory negligence. . . . All that the law required was the exercise of such care and caution as a person of ordinary prudence would use under similar circumstances."

This rule has been adhered to in the following cases: *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Reed v. Spokane*, 21 Wash. 218, 57 Pac. 803; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *McLeod v. Spokane*, 26 Wash. 346, 67 Pac. 74; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Benson v. Hamilton*, 34 Wash. 201, 75 Pac. 805; *Perry v. Centralia*, 50 Wash. 670, 97 Pac. 802.

The case of *Hobert v. Seattle*, 32 Wash. 330, 73 Pac. 383, relied on by appellant, can be distinguished from this case as one falling within that class of cases arising out of unusual conditions, wherein a city is not bound in the same degree as in cases where it knowingly permits a condition which is, or may be, hazardous to life or limb. That case was distinguished when written from the rule of this case, by reference to the case of *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114, and also in *Perry v. Centralia*, 50 Wash. 670, 97 Pac. 802. In the *Jordan* case the court said:

"The fact that the walk was in daily use, and others passed over it without injury, and that it was left open to the public by the city, tends to show that the hole in the walk and the walk at that place could, with ordinary care, be passed over in safety; that the danger was slight."

The jury with all the facts before it and under proper instructions of the court has found that respondent used that degree of care and caution which a person of ordinary pru-

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dence would have used under similar circumstances. The judgment of the lower court is therefore affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 7935. Department One. May 20, 1909.]

S. TSUTAKAWA *et al.*, *Appellants*, v. H. KUMAMOTO *et al.*,
Respondents.¹

RAILROADS—CONSTRUCTION—LIENS — STATUTES — CONSTRUCTION — PROVISOS. As a proviso to an act is not a part of, but a restraint upon or exception to it, Laws 1893, p. 32, § 1, as amended by Laws 1905, p. 229, which gives a lien to every person "furnishing material to be used in the construction of a railroad" does not give a lien for provisions, groceries and camp equipment supplied to a subcontractor; although there is added a "proviso" to the act to the effect that the railroad company shall take from contractors a bond to pay all persons who supply provisions, or be liable to the extent of such debts.

STATUTES—TITLE OF ACT—PROVISO. An act entitled an act providing for liens for labor performed, material, provisions, and supplies furnished, the body of which gives a lien for labor and materials only, does not give a lien for supplies, although a proviso makes the company liable for supplies in case a bond is not taken from contractors to secure the same, since the title and provisos to an act do not extend its effect.

RAILROADS—CONSTRUCTION—LIEN. A complaint in an action against a railroad company and a contractor for equipment sold to the contractor and to foreclose a lien on the railroad, states a cause of action against the contractor, although demurrable as to the company because the statute gives no lien therefor.

Appeal from judgments of the superior court for Thurston county, Linn, J., entered July 27, 1908, August 31, 1908, and October 23, 1908, sustaining demurrers to the complaint, dismissing an action to foreclose a materialman's lien. Affirmed.

¹Reported in 101 Pac. 869; 102 Pac. 766.

James Kiefer and Andrew J. Balliet, for appellants.

Ellis, Fletcher & Evans, Bogle & Spooner, and Roberts & Hulbert, for respondents.

CHADWICK, J.—The only question involved in this appeal is whether the value of the provisions and groceries and some camp equipment supplied by the appellants to the Nippon Construction Company, while that company was engaged as a subcontractor on the grade of the Oregon and Washington Railroad Company, can be recovered from the railroad company. Failing to receive payment from the subcontractor, appellants filed a lien upon that portion of the railroad grade constructed by them, and thereafter brought this suit to foreclose their lien. All parties defendant other than the Nippon Construction Company appeared in the court below, and filed general demurrers, which were sustained. Appellants elected to stand upon their complaint as finally amended.

This action on their part brings to us for construction § 1, ch. 24, Laws 1893, page 32, as amended by ch. 116, Laws 1905, page 229. The title of the original act was: "An act creating and providing for the enforcement of liens for labor and material." When reenacted no change was made in the body of the act. The title, however, was made to read as follows: "An act relating to liens for labor performed, material, provisions and supplies furnished," etc. The original act was before this court for construction in the case of *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106, decided January 4, 1905, and in the case of *Laidlaw v. Portland etc. R. Co.*, 42 Wash. 292, 84 Pac. 855, decided March 15, 1906. Section 1 is quoted in full in each of these cases, and will not be reproduced here. In the *Armour* case it was held that a recovery could not be had for provisions furnished by the plaintiffs to a contractor for the construction company, although the word "provisions" was in the proviso of the original act, it being con-

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tended that the word "provisions" fell within the reasonable scope and meaning of the word "material," as used in the title of the act. This court said:

"The word 'material' has a well defined and understood legal significance. Every state in the Union has laws for enforcing liens for labor and material, furnished in the construction of buildings and other structures; and, when the title of an act is, 'An act creating and providing for the enforcing of liens for labor and material,' the mind naturally goes to the construction which has uniformly been placed upon the words used in the title of the act, and their ordinary meaning. Under the lien laws, generally, 'material' is deemed to be something that goes into, and becomes a part of, the finished structure, such as lumber, nails, glass, hardware, and a thousand other things that might be mentioned which are necessary to the complete creation of a building or structure; while the word 'provisions' is ordinarily understood to be—just what was furnished in this case—some kind of an edible; and it seems to us, in the language of the appellant, that it would be a strained and fantastic view to hold that provisions of this character were comprehended in the word 'material.' Webster's definition of material is, 'The substance or matter of which anything is made or may be made;' and that, we think, is the ordinary understanding of the word; while the same author defines provisions as 'a stock of food; any kind of eatable, collected or stored.' If it should be held that provisions, in this sense, were lienable under the title of this act, because they were a necessary element in the prosecution of the work, by the same reasoning under this title horses necessarily used in the grading of the road, and even the food or provisions used by such horses, could reasonably be contemplated and provided for in the act. It can readily be seen that such a construction would destroy all limitation, and render nugatory this wise provision of the constitution."

With evident intent to cure this omission of the law, the change in the title of the act was made, in which, as we have suggested, the word "provisions" was inserted in the title. Assuming this to have been the purpose of the legislature, did it accomplish it? In the construction of statutes,

courts look first to the intent of the act, and if the words employed in the declaring part of the statute be plain, unambiguous, and well understood according to their natural and ordinary sense and meaning, the statute itself furnishes a rule of construction beyond which a court cannot go. A proviso attached to a statute is not a part of, but a restraint upon, an exception to, or a modification of some word or phrase of an act. *Sutherland*, Stat. Constr. 222; *Black*, Interpretation of Laws, 270; *The Matter of Webb*, 24 How. Pr. 247. In other words, a proviso or an exception to a general statute involving no uncertainty and doubt cannot be held, nor can words be selected therefrom, to add to the declaration of the subject-matter expressed in the body of the act.

In the case of *Smith v. People*, 47 N. Y. 330, cited and quoted with approval in the case of *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522, it is said "that intent must be primarily sought in the language of the statute, and if words have a well understood meaning, are of themselves precise and unambiguous, in most cases no more can be necessary than to expound them in their natural and ordinary sense." Section 1 of the act contains no words or phrases of doubtful meaning, nor do they lack the element of precision.

"In other words, it seems to us clear that it [the act in question] was intended to relieve railroad property from the burden of the lien if a good and sufficient bond is provided for the security of the labor and material." *Laidlaw v. Portland etc. R. Co.*, *supra*.

There can be no question as to the object of the law. A proviso usually, and in the case at bar, does work an exception to the declaring part of the act. As was said in the same case:

"The bond [provided for in the proviso] is made security for what the prior portion of the section has said shall be lienable against the railroad property."

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In that case as in this we must look to the prior portion of the act for the subjects of the lien. We are bound by the act and cannot supply an omission in it by reference to the proviso or the title. The legislature cannot write an enacting clause and a proviso and call it a statute. While a title must be as broad as that part of the act which declares its subject-matter, the law will not be extended in its operation to meet the words or terms employed in the enacting clause if it be broader than the body of the act, as it is in this case. In this conclusion we are sustained by the logic of the *Laidlaw* case. In that case it was sought to charge the company for labor, in a direct action at law. It was held that, notwithstanding the company had not taken the statutory bond, it could not be so held, for its liability was limited by the declaring portion of the act, and the right of action was dependent upon the filing of a lien. The court said:

"So in the statute before us, the proviso should not be held to enlarge the enacting portion of the section so as to create an entirely independent and cumulative remedy which is not in any sense related to the enforcement of liens, of which subject the enacting part solely treats, but it constitutes an exception defining certain conditions, which shall not be subject to the operation of the enacting part."

The object of these statutes is to secure a lien to the laborer and materialman for that which goes into the finished structure. In the case of *McCormick v. Los Angeles City Water Co.*, 40 Cal. 185, the claim of one who had performed service as a cook for men engaged in the construction of a reservoir was rejected, notwithstanding the cooking was done on the ground as the work progressed. In that case the court said:

"If the plaintiff can assert a lien on the facts proved, he could as well have done so if the cooking had been performed at any other place; and if the mere fact that a person is employed to cook for the laborers engaged in erecting a building entitled him to a lien, the same result would follow if he had furnished the provisions also. On the same theory a blacksmith who shod the horses, or a grain dealer who fur-

nished them forage whilst employed on the work, or a wagon maker who repaired the carts of the contractor, would be entitled to a lien on the building. And if every one who contributed indirectly and remotely to the work is entitled to a lien, no reason is perceived why a surgeon called to set a broken limb of one of the laborers, whereby he will be enabled at an early day to resume work on the building, might not assert a lien; but services of this character, not performed on the building, are not within the province of the statute."

Neither can a lien be asserted for the camp equipments, unless we hold that they are comprehended in the term "materials." The word "supplies" was placed in the title of the act of 1905, but it nowhere occurs in the body of the act. The word "supplies" is broader than the word "materials," but "it cannot by any fair construction be construed so as to include material furnished." *Lawson v. Higgins*, 1 Mich. 225.

Liens of this character are in derogation of the common law. Depending solely on the statutes, courts have persistently refused to extend their operation for the benefit of those who furnish supplies, means, or money to carry on a work, unless they come clearly within the terms of the statute. In the case of *Allen v. Elwert*, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54, the supreme court refused to allow a lien for certain tools and appliances belonging to the workmen and used by them merely for the purpose of facilitating their work. The court, in the case of *Gordon Hardware Co. v. San Francisco etc. R. Co.* (Cal.), 22 Pac. 406, in defining the word "material," denied a lien for tools of trade, the court said:

"As well might a house be held under a lien for a chest of carpenter's tools sold to the man who had contracted to build it, as a railroad for picks and shovels used by a contractor in grading it, or for nails, spikes, iron, steel, and other like material used by him for the purpose of erecting temporary habitations and sheds for the occupancy of his men and animals while engaged in the work."

To the same effect is the case of *McAuliff v. Jorgenson*, 107 Wis. 132, 82 N. W. 706.

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Opinion Per Curiam.

We think the court did not err in sustaining the demurrer to the amended complaint. The judgment is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ.,
concur.

ON REHEARING.

[Decided June 28, 1909.]

PER CURIAM.—Upon petition for rehearing and modification of the judgment of this court, our attention is called to the following expression occurring in the written opinion:

“All parties defendant other than the Nippon Construction Company appeared in the court below, and filed general demurrers, which were sustained.”

It is now asserted that the Nippon Construction Company did in fact appear and file a demurrer, which was sustained; and that, under any view of the case, appellants are entitled to a reversal as to the Nippon Construction Company. The transcript does not disclose any demurrer on behalf of the Nippon Construction Company, although it does recite an order overruling such demurrer. No appearance was made in this court by the construction company, and we assumed, as now appears erroneously, that no demurrer had in fact been filed. Therefore, assuming that the demurrer was inadvertently omitted from the transcript, and considering the amended complaint as against the Nippon Construction Company, it clearly states a cause of action. The judgment of the court will, therefore, be modified, and the case remanded with instructions to the lower court to overrule the demurrer of the Nippon Construction Company, and that it entertain such further proceedings as may occur, preliminary to the final judgment.

[No. 7966. Department One. May 20, 1909.]

GRAYS HARBOR AND PUGET SOUND RAILWAY COMPANY,
Appellant, v. OTTO KAUPPINEN *et al.*, *Respondents*.¹

EMINENT DOMAIN—DAMAGES—VALUE OF PROPERTY. Under Const. art. 1, § 16, providing that no private property shall be taken for public use without just compensation having been first made, the measure of damages for the taking of property is its value at the time of the trial, including improvements made since the filing of the petition, rather than its value at the time of the commencement of the proceedings.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered November 23, 1908, upon the verdict of a jury assessing damages in a proceeding to condemn land for railroad purposes. Affirmed.

J. B. Bridges (*Bogle & Spooner*, of counsel), for appellant.

A. M. Abel and *J. C. Cross*, for respondents.

GOSE, J.—This action was instituted by the petitioner, a public service corporation, to condemn certain town lots. About November, 1906, the petitioner surveyed its line of road through the property sought to be condemned, and about the same time parties acting in its behalf sought to purchase the property for the petitioner. In the month of February, 1907, the petitioner commenced this proceeding, and on October 19, 1908, a decree was entered, adjudging that the proposed use was a public one, and that public necessity demanded the prosecution of the enterprise. On November 17, following, the case was tried to a jury for the purpose of ascertaining the compensation that should be paid to the property owner. After a survey of the proposed line of road across the property and before the commencement of the action, the then owner commenced the construc-

¹Reported in 101 Pac. 835.

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Opinion Per Gose, J.

tion of a residence upon the property, which was not completed until some time after the commencement of this action. After the completion of the house and before the trial of the cause, Kauppinen conveyed the property to his co-respondent. The court instructed the jury as follows:

"I would say to you, gentlemen, that this value that you find must be the value as found today, irrespective of any increased value that has been put on the lots by the contemplated improvements of the railroad; that is, if there is any increased value, the owner is entitled to that just the same as any one else, that is, you take the lots as to the value today, whether the railroad company has increased it or not."

The petitioner assigns error in the giving of this instruction, and contends that compensation should be made on the basis of the value of the property at the time of the filing of its petition, and that the value of the improvements should be excluded in arriving at the compensation which the petitioner should be required to pay the owner of the property.

Section 16, art. 1, of the constitution provides:

"No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law."

The proper construction of this provision was before the court in *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393, 33 Pac. 966. At page 402 the court said:

"We think that the true measure of damages in such cases is the fair market value of the land taken at the time of the appropriation . . ."

See, also, *Northern Pac. & P. S. R. Co. v. Coleman*, 3 Wash.

228, 28 Pac. 514. This construction is supported by the following cases, in construing similar constitutional provisions: *Denver & R. G. R. Co. v. Griffith*, 17 Colo. 598, 31 Pac. 171; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 122.

It is argued that this construction was rejected in *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864. It is true that in that case the court instructed the jury that the property owner was entitled to the market value of the property on the 23d day of July, 1901, which was the date on which the petition for condemnation was filed. The landowner was content with the verdict and judgment, and the question involved in this case was not urged by the condemnor on appeal. Many other questions were considered, but that part of the instruction was not discussed. No error having been assigned or urged against it, it was not before the court. There was no intention to modify the construction previously adopted.

There is a great variety of opinion upon this question in other jurisdictions. In some of the cases cited by the petitioner the rule for which it contends has been adopted. The reason assigned is that the filing of the petition constitutes a taking within the meaning of the law. Admittedly this view could not obtain under our constitution. In this state, in cases of this character, the property cannot be *taken* or *appropriated* until compensation has been made, or ascertained and paid into court. Every owner of property holds it subject to the right in the public to appropriate it to a public use. However, this right in the public does not preclude the owner from improving his property, even after a survey has been made and a petition filed. It must be conceded that, at any time preceding the decree of appropriation, the party seeking to condemn, if not in possession, can abandon his proceeding. *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305. The rule fixing the value of the property as of the time of such trial is not only definite, but just to both the owner and the public. Moreover, it.

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Statement of Case.

would seem that no other construction could be adopted without doing violence to the language of our constitution.

A further review of the cases from other jurisdictions would serve no useful purpose. Not only do they construe constitutional provisions not identical either in language or meaning with our own, but they arrive at such a variety of conclusions that a review of them would be fruitless. The judgment will be affirmed, and the respondents will have judgment for their costs.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ.,
concur.

[No. 7989. Department One. May 21, 1909.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v.
COLEMAN DEVINE *et al.*, *Appellants*.¹

ADVERSE POSSESSION—HOSTILE CHARACTER—PERMISSIVE USE—JUDGMENT—VACATING DEFAULT—EJECTMENT. Occupancy of a \$12 shack for nearly twenty years on a railroad company's premises by an old employee, who had no deed and had paid no taxes, appears to have been merely permissive as a squatter; and in ejectment it is not an abuse of discretion to refuse to vacate a default judgment on such a showing.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 4, 1908, denying a motion to vacate a judgment, after a trial on the merits before the court without a jury, in an action to recover possession of real property. Affirmed.

Loveday, Kelley & McMillan (L. L. Merritt, of counsel),
for appellants.

Geo. T. Reid and *Charles A. Murray*, for respondent.

¹Reported in 101 Pac. 841.

MORRIS, J.—On the 13th day of November, 1908, respondent commenced its action, by the service of summons and complaint, upon appellants, in which action it sought to recover possession of the premises occupied by appellants. On December 4, appellants not having appeared, default and judgment was entered against them, and upon December 7 a writ of restitution issued. Upon the same day, appellants filed a motion to vacate the judgment, upon the ground of mistake, inadvertence, surprise, and excusable neglect. The writ was thereupon stayed and, in due time, after the service of affidavits in support of and in opposition to the motion to vacate, the same was denied.

It would be much of an undertaking and serve no good purpose to recite the substance of the various affidavits read upon the hearing. It is sufficient to say that, after a reading of them, we can find no reason for holding that there was an abuse of sound legal discretion on the part of the court below in holding the showing insufficient to vacate the judgment and permit appellants to come in and defend. The most that could be said of appellants is that they were mere squatters, who for nearly twenty years had occupied a shack near respondent's roundhouse in Tacoma, which they purchased for \$12. They had no deed; they had paid no taxes; their only indication of ownership was occupancy which, it is apparent from the showing, was permissive. While we do not desire to be understood as holding that deed and payment of taxes were essential to appellants' claim, yet, under all the circumstances here shown, the absence of these strongly indicates appellants were squatters, and their occupancy was permissive, induced largely by the fact that Coleman Devine was an old employee of respondent, and the respondent had no use for the premises.

The judgment is affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and CHADWICK, JJ.,
concur.

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Opinion Per Gose, J.

[No. 7854. Department One. May 24, 1909.]

CHARLOTTE E. NORTHCRAFT *et al.*, *Appellants*, v.I. BLUMAUER *et al.*, *Respondents*.¹

LANDLORD AND TENANT—USE OF PREMISES—WASTE. The graveling of a leased right of way for a logging road that was to have been timbered is not such waste as to warrant a cancellation of the lease, where the rental value of the land was not impaired, drainage ditches benefited the land in excess of the damage, and the lessee can be compelled to remove the gravel or respond in damages at the end of the term.

FRAUDS, STATUTE OF—PAROL LEASE FOR YEARS—PERFORMANCE. A parol lease of a logging right of way for a longer period than one year will not be set aside at the instance of the landlord, where the lessee took possession with the lessor's consent, constructed a road at an expense of \$5,000, benefited the land by ditches, and purchased the lessor's timber as an incident to procuring the right of way; as such course would be inequitable.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered September 30, 1908, in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Modified.

Troy & Sturdevant and *John M. Wilson*, for appellants.

T. M. Vance, for respondents.

GOSE, J.—The appellants commenced this action for the purpose of ejecting the respondents from a certain right of way across their land. The complaint charges, in substance, that Charlotte E. Northcraft is the owner of a life estate in a certain donation claim, with remainder in fee to her minor son, her co-plaintiff, of whom she is guardian; that on August 1, 1906, she, acting for herself and her ward, but without permission from the court, made an oral lease to respondent I. Blumauer of a right of way across such land; that pursuant to the lease, the respondents entered into possession of such right of way; that more than thirty days prior to Aug-

¹Reported in 101 Pac. 871.

ust 1, 1907, she served notice upon the respondents of the termination of the lease, and demanded possession of such right of way on August 1, 1907, and that they have refused to deliver such possession.

The respondents pleaded affirmatively (1) that about July 1, 1906, the respondent Isaac Blumauer, as president of the Blumauer Logging Company, for the purpose of procuring a right of way for a logging railroad across such land, agreed with the appellant C. E. Northcraft, and she with him, that, in consideration of \$300, she would sell certain timber, and that for a yearly rental of \$25 she would permit the respondents to construct and operate a railroad logging road across such premises for a period of ten years, such way to be selected off the cultivated land; that the respondents slashed their right of way in accordance with such agreement; that after such right of way had been slashed, the said Blumauer and C. E. Northcraft viewed the same, and that she then consented to the right of way thus chosen; that thereafter and about August 1, 1906, in pursuance of the contract, the respondents paid her the sum of \$325, being payment for the timber and the first year's rental for the right of way; that thereafter at large expense the respondents constructed their logging road across such premises and along the route which she had examined and agreed to; that in so doing, the land being a marsh, they were compelled to place a part of the road upon a trestle and a part thereof upon a gravel bed; that they constructed a spur to the timber purchased from the appellants, for the purpose of removing such timber; that in the building of the road they constructed and opened ditches along the right of way and laterals about one mile in length for drainage purposes; that such ditches reclaimed a large part of such land and constitute a permanent improvement of the same; that the cost of such ditches was \$200; that thereafter the appellants objected to a continuation of such right of way at a point two thousand eight hundred and fifty feet from the north side of their land, and the

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placing of gravel thereon, and it was then agreed between appellants and respondents that appellants would ratify all the work theretofore done and let the respondents have the right of way as constructed for the period of fifteen years, at the yearly rental of \$50, and that the respondents could at such point continue their line through the remainder of appellants' property so that the logging road could be used for the removal of other timber which they owned, and that, relying thereon, they constructed such road prior to the commencement of this suit; that it was also a part of such agreement that respondents should remove all the gravel on the first six hundred foot spur, and all the gravel between such change along the main line to the east line of appellants' premises, the first six hundred feet to be removed immediately after the respondents shall have removed the timber purchased from the appellants, and the other when directed by a decree of the court; that all the timber purchased from the appellants has been cut, but a part thereof has not been removed; that the respondents are engaged in the mill and logging business, have a large capital invested therein, and that a cancellation of such lease would cause them irreparable injury.

Issue was joined on the new matter pleaded in the answer. The cause was tried to the court; whereupon it entered a decree in favor of the respondents, which is in part as follows:

"It is ordered, adjudged and decreed that the defendants are entitled to the use of the right of way used as a logging railway across the premises of plaintiffs according to the description thereof contained in the pleadings in the cause."

From such decree, to which suitable exceptions were taken, this appeal is prosecuted. There were no findings of fact or conclusions of law other than the foregoing excerpt from the decree.

A careful reading of the evidence discloses that the respondents entered upon the land and constructed a standard gauge logging railroad some thirty-two hundred feet in

length, at an expense of \$5,000, the greater part of which was upon the line agreed to by the appellants; that in the building of the road they constructed drainage ditches at an expense of about \$200, which reclaimed several acres of land and augmented both its rental and permanent value; that they paid the appellants \$300 for the timber and \$25 for the first year's rental for the right of way, and at the proper time tendered them \$50 as rental for the second year, in accordance with the alleged second agreement; that the appellants' land is situate between the respondents' sawmill and a large body of their timber; that, as the appellants knew, the respondents purchased the appellants' timber only as an incident to the procuring of the right of way. It may also be gathered from the evidence that the respondents agreed to timber the right of way, and that the graveling was done without appellants' consent. The evidence does not show that the graveling impaired the rental value of the land, or that it materially affected the fee. We do not think it is such waste as would authorize a cancellation of the lease. 30 Am. & Eng. Ency. Law (2d ed.), 239.

The appellants urge that they can terminate the lease and recover possession of the right of way under the rule announced in *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852; *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934; *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322, and *Snyder v. Harding*, 38 Wash. 666, 80 Pac. 789. A parol lease for a longer period than one year, where the lessee has taken possession with the consent of the lessor, is only voidable, and it will not be terminated at the instance of the landlord when such course would be inequitable. *Watkins v. Balch*, *supra*. As was said in that case: "This on the principle that it would be permitting the statute to perpetrate, rather than prevent, frauds."

A strict application of the statute would in this case be a manifest injustice to the respondents. They purchased the appellants' timber primarily for the purpose of securing the

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right of way. With the consent of the appellants they have expended a large sum of money in the construction of a logging railroad. The evidence leaves it exceedingly doubtful whether the drainage has not benefited the land in excess of the damage sustained by the graveling of which complaint is made. If timely application had been made, the graveling would have been enjoined. 30 Am. & Eng. Ency. Law (2d ed.), 293. The respondents can be required in a proper action to remove the gravel or respond in damages at the expiration of the lease. This will afford a sufficient remedy to the appellants, and will not deny the respondents the benefit of either their contract or the money which they have expended pursuant to it. The trial court had the benefit of the presence of the witnesses and presumably adopted the evidence most favorable to the respondents. However, the decree should have been in favor of the respondents for the leasehold period only. It was not so limited and, in the absence of a finding, we are not advised as to the court's view as to the life of the lease. We do not think the respondents have established the second contract by a preponderance of the evidence. In view of the fact that the minor was fourteen years of age at the time of the making of the lease, we are impressed with the appellants' testimony that the lease was for seven years only.

The judgment will therefore be modified so as to give the respondents the benefit of the right of way until August 1, 1913, at the yearly rental of \$25. The appellants will recover their costs.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ.,
concur.

[No. 7842. Decided May 24, 1909.]

H. M. GOULD *et al.*, Appellants, v. H. KNOX *et al.*,
Respondents.¹

APPEAL—NOTICE—TIME FOR TAKING—TAXATION—FORECLOSURE PROCEEDING. Laws 1903, p. 75, § 4, requiring an appeal to be taken from a judgment in a tax foreclosure case within thirty days, has no application to appeals from judgments in independent actions in equity to set aside a tax foreclosure judgment and sale and to quiet title, which must be taken within ninety days (DUNBAR, MOUNT, and CROW, JJ., dissenting). *McCausland v. Bailey*, 51 Wash. 183, overruled.

TAXATION—ACTION TO SET ASIDE TAX SALE—REDEMPTION—TENDER—WAIVER. Purchasers at a tax foreclosure, by asserting title and refusing to consider a tender of the taxes, waive the tender required by Bal. Code, § 5678, as a condition precedent to action to set aside the sale.

PROCESS—SUMMONS BY PUBLICATION—SUFFICIENCY. Under Laws 1897, p. 182, § 96, authorizing service of summons by publication directing the defendant to appear within sixty days after the date of the first publication, a summons requiring the defendant to appear within sixty days after the "service" of the summons is insufficient to confer jurisdiction to enter judgment by default.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 9, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to vacate tax sales and to cancel a tax deed. Reversed.

H. H. Eaton and Sullivan & Stevens, for appellants.

William C. Keith, for respondents.

CHADWICK, J.—This is a suit in equity, brought by plaintiffs to set aside two tax sales, each involving forty acres in King county, and to cancel a tax deed executed in consequence thereof. The case was tried, and a decree entered in the court below on the 9th day of April, 1908, in favor of defendants, from which decree plaintiffs have appealed.

¹Reported in 101 Pac. 886.

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Opinion Per CHADWICK, J.

From the record it appears that a motion for a new trial was filed by appellants and overruled by the court, on the 16th day of May, 1908. Notice of appeal was given August 13, 1908, eighty-seven days after the time for appeal had begun to run. We are met at the threshold with a motion to dismiss the appeal. It will be seen that the appeal was not taken within thirty days after the time for appeal began to run, and for that reason the case falls squarely within the rule announced in the late case of *McCausland v. Bailey*, 51 Wash. 183, 98 Pac. 327, and if that case is to be allowed to stand as authority, the appeal must be dismissed. In *Brown v. Davis*, 36 Wash. 135, 78 Pac. 779, the rule was announced that § 4 of the act of 1903 (Laws 1903, p. 75), requiring an appeal to be taken from a judgment in a tax foreclosure case within thirty days from the time of its rendition, applied to a motion to vacate a judgment entered in such cases. This was affirmed in the case of *Pedigo v. Fuller*, 37 Wash. 529, 79 Pac. 1129, and the case of *Harris v. Levy*, 39 Wash. 158, 81 Pac. 550, wherein the act of 1903 was applied to a judgment dismissing an action in a tax case. In the latter case the court said, speaking of the thirty-day limit for appeals:

"This court has already construed the statute to mean that said period applies not alone to the judgment of foreclosure, but to other judgments of final effect in the action."

The *McCausland* case extended this doctrine to cover an appeal from a decree rendered in an independent suit in equity brought to cancel and set aside a tax deed alleged to be the product of the void foreclosure proceeding. The court said:

"The only distinction between those cases and the case at bar is that this is an action in equity to set aside a tax foreclosure judgment."

After quoting from the case of *Brown v. Davis*, *supra*, the opinion continues:

"It seems to us that the reason of the court in that case applies equally to the case at bar, and that the action in this

case is in effect an action to vacate the judgment. When the court refuses to vacate a judgment, the whole matter in controversy is ended; and upon the trial of the cause in the equitable action to set aside the judgment, the result is exactly the same. There were two modes of attack, either of which could have been adopted by the appellants in this case; to move directly in the tax foreclosure to vacate the judgment, as in the case just cited, or to bring an independent suit in equity for that purpose, as the appellants here have done. The final effect being the same, it would seem that the object of the law in limiting the time for appeal in tax foreclosure proceedings would equally apply to both. In addition to this, it has been the uniform holding of this court that judgments stand upon the same footing, whether rendered in the original action on motion to vacate or in an independent action brought for that purpose. *Post v. Spokane*, 35 Wash. 114, 76 Pac. 510; *Sengfelder v. Powell-Sanders Co.*, 40 Wash. 686, 82 Pac. 931. In *Sengfelder v. Powell-Sanders Co.*, *supra*, this court said: 'Outside of authority, it is manifest that the only result of the action in either case is to obtain a new trial. Hence, it is in effect a proceeding in the case, and the form of the action is entirely immaterial.' The same may be said here—that the result sought is the same whether the proceedings be a motion in the case to vacate the judgment, or an action in equity to set aside the judgment. The form of the action is equally immaterial. It is true, it is suggested by the respondents that a demand is also made in the complaint in this action for the quieting of the title to the lands in question in the appellants. But this, of course, is only an incident to the main issue, a result which would naturally follow if the appellant should have prevailed."

All of the questions raised in the cases cited in the *McCausland* case occurred in the original action. These cases should not be taken as authority to sustain the proposition here involved, unless we are willing to hold that the procedure outlined in the act of 1903 is exclusive of all other remedies, in cases where the legality of a tax foreclosure proceeding is incidentally involved. Upon no other theory can the *McCausland* case be sustained. We think it can hardly be asserted that it was the intention of the legislature to abolish the settled practice and jurisdiction of courts of equity, and

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exclude from their consideration actions brought to quiet title to land, when the cloud arose out of a void tax foreclosure proceeding. It is certain that the act in question does not in terms undertake to deprive a party of any existing remedy, and it seems to us that it will not bear that construction. On the contrary, it excludes any such hypothesis. In both the title and body of the act it goes no further than to cover the practice in tax foreclosure cases. The section now under discussion, when considered in its entirety, shows that the legislature intended to declare a rule of practice in cases in which the public had an interest, whether the case be prosecuted by the county or by an individual. Else, why this language?

“ . . . no bond given on appeal as herein provided shall operate as a supersedeas, unless the party taking such appeal shall before the time of giving notice of such appeal, and within thirty days herein allowed within which to appeal, deposit with the county treasurer of the county in which the land or lots are situated, an amount of money equal to the amount of the judgment and costs rendered in such cause by the trial court.” Laws 1903, p. 75, § 4.

This is an action prosecuted by one who claims to own the land, and who alleges that he has tendered the amount of all taxes, interest, penalties, and costs paid by respondents, which, by Bal. Code, § 5678 (P. C. § 8733), is made a condition precedent to the maintenance of their suit. The county and the state have no interest. Appellants cannot deposit the amount of taxes with the county treasurer to abide the result of the action. There is no law authorizing the treasurer to receive it, or to act as stakeholder between private litigants. If the public, then, has no interest, the reason for the special limit of thirty days for an appeal fails, and the parties should be relegated to the ordinary forms and procedure for appealing cases. In the *McCausland* case the fact that § 4 of the act of 1903 (Laws 1903, p. 75), in so far as it relates to bonds on appeal, had been before this court and that it had been held that that part of the section did not apply other than to a direct appeal in tax cases, although involving the

legality of a tax deed, seems to have been overlooked. In *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606, in speaking of that part of § 4, the court said:

"The bond provided for in the revenue law is applicable only in a case where an appeal is taken directly from a judgment foreclosing the tax lien or certificate which judgment is sought to be superseded during the appeal. In other cases a bond with such conditions would be useless. There could be no liability upon it except such as would exist against the bond provided by the general statute governing appeals. It cannot be supposed that the legislature intended to require a useless and idle ceremony. We think the entire proceeding regarding the bond is governed by the general statute of appeals, and that this case falls within the principles announced in *Meagher v. Hand*, 28 Wash. 332, 68 Pac. 892, and *Nolan v. Arnot*, 36 Wash. 101, 78 Pac. 463."

It will thus be seen that the court has held that the time in which an appeal shall be taken in tax foreclosure cases, as provided in § 4, shall be extended to cover all cases of whatever nature involving a tax foreclosure proceeding; and at the same time held, in at least three other cases, in construing the latter part of the section relating to the bond on appeal, that the act applies only to foreclosure proceedings arising under the special statute. Although the final result may be the same, in that an owner may recover his property, and although that consideration may with propriety have been considered by the legislature, it nevertheless has occurred to a majority of the court as now constituted that the court went beyond the legitimate limit of construction when it declared in the *McCausland* case that an appeal should be prosecuted in an ordinary suit in equity within thirty days after judgment in the lower court. We now hold that the general statute relating to appeals applies to all independent suits in equity to set aside a tax judgment and sale and to quiet title, and therefore overrule the case of *McCausland v. Bailey*, *supra*.

This disposition of the motion to dismiss brings us to the merits of the case. The lower court dismissed the action for

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the reason that an insufficient tender was made. In this conclusion the court erred. The testimony shows that the respondents asserted title to the land and refused to consider the tender or the amount thereof. Such conduct on their part constituted a waiver of the payment or tender prescribed by Bal. Code, § 5678 (P. C. § 8733). *Griesemer v. Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031; *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822; Hunt, Tender, par. 26; *Bender v. Bean*, 52 Ark. 132, 146; *Bright v. Boyd*, 1 Story (U. S.) 478; 27 Am. & Eng. Ency. Law (2d ed.), pp. 857-8. Respondents having indicated that a tender would have been ineffectual, and having set up the strength of their own title, the only question to be determined is the regularity of the tax foreclosure proceeding. The attempted foreclosure was void within the rule announced in the following cases: *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640.

No finding was made by the lower court either as to the amount of taxes, penalties, interest, and costs, or as to the value of improvements placed upon the land by respondents. Owing to the unsatisfactory state of the record, we have decided to remand this case with instructions to the court below to determine these facts under chapter 137, Laws 1903, p. 262, and to enter judgment accordingly.

RUDKIN, C. J., FULLERTON, GOSE, and PARKER, JJ., concur.

DUNBAR, J. (dissenting).—The further discussion of the motion involved in this case would seem to be unprofitable, in view of the fact that anything I could say in support of said motion would only be a repetition in substance of what has been said by this court at least half a hundred times, viz., that the form or name of an action is immaterial. The whole argument of the majority, it seems to me, is simply an attempt to refute this wholesome rule and establish the worship

of a name instead of an essence. The Bard of Avon, some hundreds of years ago, made the announcement that there was nothing in a name; that "A rose by any other name would smell as sweet." This poetical expression has, I think, always been regarded as a truism, and it is regrettable that it should at this late day meet with a judicial reversal. On this question I am, therefore, compelled to dissent.

Crow, J. (dissenting)—The deliberate construction of a statute involving practice and procedure should not be overthrown immediately after its announcement by this court. Under our former holdings the motion to dismiss should be sustained. The doctrine of *stare decisis* should receive some recognition. I therefore dissent.

MOUNT, J., concurs with CROW, J.

[No. 7857. Decided May 25, 1909.]

ROBERT E. CLEARY, *Respondent*, v. GENERAL CONTRACTING COMPANY, *Appellant*.¹

APPEAL—REVIEW—WAIVER OF ERROR. Error in refusing a nonsuit is waived by putting in evidence in defense.

MASTER AND SERVANT—INJURIES—SAFE APPLIANCES—EVIDENCE—PRIMA FACIE CASE—RES IPSA LOQUITUR. That a scaffold, furnished by a master for a servant to work on, broke when properly used for that purpose, is sufficient to make out a *prima facie* case of negligence on the part of the master, as the doctrine of *res ipsa loquitur* applies.

SAME—SAFE PLACE—SCAFFOLDS—INSTRUCTIONS. In an action for injuries sustained by a fall from a scaffold furnished by defendant for plaintiff to work on, the court properly refused to charge the jury that the plaintiff cannot recover unless he proves by a fair preponderance of the evidence his allegations that plaintiff orally agreed to furnish a safe and secure scaffold, since the law would imply that the scaffold was to be safe and secure; especially where the point was in effect covered by another instruction.

¹Reported in 101 Pac. 888.

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Citations of Counsel.

TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. Instructions do not violate Const. art. 4, § 16, prohibiting charges with respect to matters of fact and comment on the evidence, where they do no more than set forth the legal effect of a certain state of facts.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 29, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through a defective scaffold. Affirmed.

Post, Avery & Higgins, for appellant, contended that the doctrine of *res ipsa loquitur* is inapplicable to a master and servant case. *Northern Pac. R. Co. v. Dixon*, 139 Fed. 737; *Chicago & N. W. R. Co. v. O'Brien*, 132 Fed. 598; *Cryder v. Chicago R. I. & P. R. Co.*, 152 Fed. 417; *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457. The fact that an accident happens carries with it no presumption of negligence on the part of a master. *Patton v. Texas & Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Latting v. Owaso Mfg. Co.*, 148 Fed. 369; *Omaha Packing Co. v. Sanduski*, 155 Fed. 897; *Bergman v. Altman*, 127 Iowa 693, 104 N. W. 280; *Sargee v. Clark Can. Co.*, 126 Mich. 508, 85 N. W. 1105; *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077; *Ludd v. Wilkins*, 118 Ga. 525, 45 S. E. 429. The master is not a guarantor of the safety of appliances or places. *Patton v. Texas & Pac. R. Co.*, *supra*; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385. The building of the scaffold was the work of fellow servants. *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114; *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278, 47 Atl. 1085; *Garrow v. Miller*, 72 Vt. 284, 47 Atl. 1087; *O'Connor v. Rich*, 164 Mass. 560, 42 N. E. 111, 49 Am. St. 483; *Olsen v. Nixon*, 61 N. J. L. 671, 40 Atl. 694; *Hoveland v. National Blower Works*, 134 Wis. 342, 114 N. W. 795, 14 L. R. A. (N. S.) 1254. The trial judge unlawfully commented on

the evidence. Const. art 4, § 16; *Stone v. Geyser Q. M. Co.*, 52 Cal. 315; *Bardwell v. Ziegler*, 3 Wash. 34, 28 Pac. 360; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *City of Columbus v. Strassner*, 138 Ind. 301, 34 N. E. 5, 37 N. E. 719. The jury are exclusive judges of the facts, and it was error to say what inferences should be drawn, or to control the method or result of their reasoning. *Standard Cotton Mills v. Cheatman*, 125 Ga. 649, 54 S. E. 650; *Louisville & N. R. Co. v. Kemper*, 153 Ind. 618, 53 N. E. 931; *Richards v. Fuller*, 38 Mich. 653; *McQuay v. Richmond etc. R. Co.*, 109 N. C. 585, 13 S. E. 944.

Belt & Powell, for respondent.

DUNBAR, J.—This was an action to recover damages for personal injuries. Defendant is a corporation doing a general contracting business and, as such contracting company, was engaged in constructing a building in the city of Spokane. The plaintiff was employed to do the metal lathing in the building, with other men, and used a scaffold which was made by laying boards on brackets, when he was on the upper part of the wall. While he was working on the upper scaffolding, the accident happened and the injuries complained of were received. It is alleged that the scaffolding was negligently and carelessly constructed; that it fell without any warning; that the scaffolding had been furnished by the contractors; and further, that they had specially promised to furnish the plaintiff with a good and safe scaffolding. The material allegations were denied. The case went to trial, and verdict was rendered by the jury in favor of the plaintiff for \$4,000. On motion for a new trial, the court ordered the same would be granted unless the plaintiff would elect to remit \$1,500 from the verdict. The plaintiff made such election, and the motion for a new trial was denied, to which exception was taken. Judgment for \$2,500 was entered on the verdict for the plaintiff, and from this judgment this appeal is taken..

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Upon the conclusion of the respondent's testimony, appellant challenged the sufficiency of the evidence, and moved for a nonsuit, which motion was denied. A like motion was made at the conclusion of the whole testimony, which was also denied. The errors assigned are, the refusal of the court to sustain these two separate motions; that the motion for new trial should have been sustained; refusal to give instructions, and error in giving instructions; also that the verdict was excessive, and that the judgment was excessive.

It is not necessary to discuss assignment No. 1, for the reason that it is the established law of this jurisdiction that the motion is waived by putting in evidence in defense. *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264; *Conine v. Olympia Logging Co.*, 42 Wash. 50, 84 Pac. 407; *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121. Under the doctrine of these cases, it becomes necessary to consider the case upon the whole evidence introduced by both parties. Considering the argument presented under the first assignment as applicable to the second, viz., that the court erred in not granting the motion at the close of all the testimony, it is contended by appellant that the respondent failed to prove negligence on the part of the appellant and that, as the doctrine of *res ipsa loquitur* cannot apply in this kind of a case, the motion for judgment for appellant should have been sustained.

Many cases are cited to sustain the contention that the doctrine of *res ipsa loquitur* cannot apply in the case of master and servant, and it is contended by the appellant that this case was tried on the theory of master and servant. Admitting the soundness of the doctrine contended for, and as announced in *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, to the effect that, in order for the respondent to recover for his injury, it was necessary for him to show, not only that the appellant had been guilty of negligence, but that such negligence was the cause of his injury; yet, under the rule announced in *Labee v. Sultan Logging Co.*, 47 Wash.

57, 91 Pac. 560, the doctrine of *res ipsa loquitur* applies to this case. That was a case where a steel cable, furnished by the master to be used for a particular purpose, broke when used for that purpose in a proper manner, and it was held that the evidence was sufficient to make out a *prima facie* case of negligence on the part of the master in furnishing or using the cable. The court, in discussing the case, said:

"The evidence, in addition to showing that the cable broke and caused an injury to the respondent, showed that it was furnished to the respondent by the appellant for a particular purpose, and that it broke while being used in a proper manner for the purpose for which it was intended. This is some evidence of negligence on the part of the appellant. Instrumentalities intended for a particular purpose, and suitable and proper for that purpose, do not break when put to the use for which they were designed when used in a proper manner. So the converse of this proposition must be true. If the instrumentality does break when put to the use for which it is designed and used in a proper manner, it is evident that it was either defective in material or construction in the first instance, or has become so since it was put to use. Therefore, when the servant shows that the master furnished him an instrumentality to be used for a particular purpose, that he used for the purpose intended in the manner intended, and that it broke when being so used and injured him, he makes out a *prima facie* case of negligence against the master;"

citing *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065, and many other cases. That case seems to exactly decide the questions raised by the appellant in the case at bar. Here the instrumentality, the defects of which are complained of, as in the case quoted, was furnished to respondent by the appellant for a particular purpose, and it broke while being used in a proper manner for the purpose for which it was intended. The respondent showed that the appellant furnished him this instrumentality to be used for a particular purpose, and that he used it for that purpose. On this question of the furnishing of the scaffolding by the appellant to the respondent, and the assurance by the appel-

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lant that it would furnish him a sufficient scaffolding upon which to do the work, there is a direct conflict of testimony. But, of course, for the purposes of this case, the testimony of the respondent will have to be considered as the testimony of the case.

The case of *LaBee v. Sultan Logging Co.* was again presented to this court on rehearing, and is reported in 51 Wash. 81, 97 Pac. 1104, where the doctrine is reaffirmed, the court saying:

"The weight of authority seems to support counsel's contention in so far as they contend that the doctrine is not applicable to cases between master and servant. The Federal cases uniformly so hold, and in the majority of the states the same rule obtains. See, *Northern Pac. R. Co. v. Dixon*, 189 Fed. 737, and the cases there collected. But the question being a new one in this state we have felt ourselves at liberty to inquire into the reasons for the rule, and to discard it if we found the reasons given to maintain it unsatisfactory."

The court then cites several cases and discusses them, concluding by saying that:

"These latter inquiries are not material to the question in hand. They are cited to show that a holding that denies to a servant, simply because he is a servant, the benefit of the rule of *res ipsa loquitur* in a proper case, is unreasonable and unjust, and is required by no rule of public policy. We see no reason to change our former holding . . ."

So that it is unnecessary to discuss the cases cited by appellant, for the law has been definitely determined by this court contrary to its contention.

The case of *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114, cited by appellant, is not in point. There it was decided that a carpenter could not recover for personal injuries caused by the breaking of a defective plank used in the construction of a temporary staging erected by a fellow carpenter, without any supervision by the employer or his foreman, where the carpenters at work on the building, including the plaintiff, were employed, and it was customary

for them to erect their own staging, and the employer furnished suitable material for the purpose, and provided competent coservants, who failed to discover the defect in the plank on inspection, and no one had any notice thereof; since the negligence, if any, was that of a fellow servant. An entirely different state of facts existed there from the state of facts shown by the testimony of the respondent in this case, the credibility of which was passed upon by the jury. Here the staging was not built by a fellow servant under any custom or otherwise, the evidence being to the effect that the respondent was in effect a subcontractor, and that his first bid was rejected by the appellant because it was deemed to be too high, and a bid was finally accepted, and as a condition of the bid the scaffolding was to be furnished by the appellant. The testimony of Mr. Cleary on that subject, in part, is as follows:

"He asked me what I would accept the work for by the yard. I believe it was nine or nine and a half cents I stated. He said that was too much; told me he would agree to put me up a good, strong, substantial scaffold and lay the metal at my hand and allow me eight and one-half cents a yard, which I agreed to take."

Mr. Goodnight, who was present at the time the agreement was made, testified substantially to the same effect.

The appellant proposed the following instruction, and the refusal of the court to give the same is alleged as error:

"It is alleged in the complaint that the defendant orally promised the plaintiff, at the time he entered into an agreement to do this work, that defendant would build and construct scaffolding for him to work on on the outside walls of the car barn, in a safe and secure manner. If you should fail to find this allegation proven by a fair preponderance of the evidence, you must find a verdict for the defendant, no matter what you should find as to other matters, because there is no evidence that the defendant failed to furnish suitable materials out of which the workmen were to construct the scaffold or intrusted the construction of such scaffold to incompetent workmen."

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This instruction we think went too far, because, if appellant agreed to furnish the scaffolding, the law would imply that the scaffolding was to be safe and secure; and the jury would have been misled if they had followed the literal instruction of the court and found against the respondent, because the appellant did not incorporate into its agreement the condition that the scaffolding would be safe and secure. In addition to this, we think the instruction as a whole was properly given, the court instructing, among other things, as follows:

"I further instruct you that if you find by the terms of the contract entered into between plaintiff and defendant, plaintiff was to have the use of the scaffolding already erected, he would be held to have assumed the risk of any defect in materials or manner of construction which the plaintiff knew or could have known by proper exercise of his faculties, and if you find that the accident was the result of such defect, your verdict should be for the defendant."

The appellant also assigns as error the giving of the following instruction by the court:

"I instruct you further that if the scaffolding was built by defendants for the use of plaintiff in doing the work he was engaged to do and that plaintiff was rightfully thereon, and that it fell while being used by him in a proper manner for the purpose for which it was built, the presumption is that the scaffolding was either defective in material or construction in the first instance or had become so since it was put to use; and the defendants would be liable to plaintiff for the injuries, if any, sustained by him from the falling of said scaffold."

This instruction is exactly in line with the law as laid down by this court in *LaBee v. Sultan Logging Co.*, *supra*, so that it is not necessary to discuss that phase of it.

It is, however, contended further by the appellant that the court violated § 16 of art. 4 of the constitution of Washington, which provides that judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. But we are unable to discover in this in-

struction any comment on the testimony or on the weight of the testimony. The instruction sets forth the legal effect of a certain state of facts, and such an instruction cannot very well be avoided by a court, and is as admissible as any instruction informing the jury what constitutes negligence under the law.

As to the contention that the verdict was excessive, that question having been submitted to the trial judge and the reduction made, presumably in accordance with his views of what was shown by the testimony in the case, we would not feel justified, under the testimony as shown by the record, in interfering with that judgment.

There seems to have been no reversible error committed in the case, and the judgment is therefore affirmed.

FULLERTON, CHADWICK, CROW, PARKER, and MOUNT, JJ., concur.

[No. 7949. Department Two. May 25, 1909.]

WILLIAM T. WRIGHT *et al.*, *Appellants*, v. TACOMA GAS & ELECTRIC LIGHT COMPANY *et al.*, *Respondents*.¹

CORPORATIONS — STOCKHOLDERS — MEETINGS — NOTICE. The undisclosed owner of corporate stock is not entitled to notice of a stockholders' meeting, where the stock stood in the name of his brother who managed it and was notified and appeared by proxy and voted at the meeting.

CORPORATIONS — SUITS BY STOCKHOLDERS — EQUITY — LACHES. Minority owners of corporate stock are guilty of laches precluding them from maintaining an action to set aside a sale of all the corporate assets to another company, where it appears that they delayed six months before beginning suit, during which time they were waiting to see whether they could make a favorable sale of bonds of the old company held by them, and that during such time the new company had issued and sold thousands of bonds and expended a great amount of money in alterations and completing large operations.

¹Reported in 101 Pac. 865.

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Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 7, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to set aside a sale and conveyance of the property and assets of a corporation, and for an accounting. Affirmed.

E. R. York and *T. W. Hammond*, for appellants.

B. S. Grosscup and *W. C. Morrow*, for respondents.

DUNBAR, J.—This is a suit in equity, brought by plaintiffs to set aside a sale and conveyance, made by the Tacoma Gas & Electric Light Company, of all its property, franchises, and assets, to the Tacoma Gas Light Company, made against the protest of minority stockholders; and for the restoration to the Tacoma Gas & Electric Light Company of all of its property so sold, for an accounting, and general equitable relief. Upon a trial by the court, a decree was entered sustaining the sale and conveyance made and dismissing the suit. From that decree plaintiffs appeal.

The Tacoma Gas & Electric Light Company was a Washington corporation, having a capital stock of \$350,000, of which \$300,000 was issued, and was engaged in the business of the manufacture, distribution, and sale of gas to the inhabitants of the city of Tacoma, under a franchise from the city of Tacoma. It had, under its charter provisions, other rights which, with the view we take of the question of estoppel, it is not necessary to set forth in this statement. On May 23, 1906, the Tacoma Gas Light Company was organized, and on June 12, a meeting of the stockholders of the Tacoma Gas & Electric Light Company was held and a resolution was adopted by a majority vote of the stockholders ratifying and confirming the action of the trustees of the company taken on the preceding day, directing that all of the property, franchises, and assets of the old company be conveyed to the new company, which has ever since been in possession and control of the same. In the following week

the entire property and assets of the old company were conveyed to the new company by deed. At the time of the stockholders' meeting and thereafter until about November 1, 1906, the appellant C. B. Wright was in Europe, and it is claimed by him that he had no notice of the meeting, and did not know of the action taken at the stockholders' meeting until two or three months after; that he never consented to or acquiesced in that action, or the sale and conveyance made by the old company. One Seymour owned all the shares of the stock of the old company excepting the fifty shares owned by the appellants. Bonds of the new company were issued and sold, and the new corporation proceeded to do the business which the old corporation had theretofore done.

We will not enter into a discussion of the merits of this case, for we are of the opinion that, whatever right the appellants may originally have had to question the validity of the sale made by the majority stockholders has been lost by their laches. The court found that the appellants had been notified of the action of the majority stockholders in adopting the resolution to sell, and we think the record sustains such finding. It is stoutly contended by appellants that C. B. Wright, who at the time of the aforesaid action was in Paris, knew nothing of the transaction until shortly before this action was commenced; but it is shown by a letter from William T. Wright to appellants' attorney, E. R. York, that, in July, 1906, William T. Wright had neglected to answer York's letter of June 14, until, as he says, "I could hear from my brother who owns half the stock" in the Tacoma Gas Company, "and is in Europe." The reasonable interpretation of this letter is that he had heard from his brother before answering York's letter. It also appears that Mr. Seymour had called on C. B. Wright, and talked over the business of the corporation generally. The whole record convinces us that C. B. Wright was duly notified of the sale of the stock.

But, even conceding that he was not notified, he had no standing which would have entitled him to notification. If he

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was an owner at all, he was an undisclosed owner, for it is conceded that the stock was issued to, and stood in the name of, William T. Wright, who managed it and who employed attorney York to appear at the stockholders' meeting and represent the fifty shares of stock. York did appear by proxy for William T. Wright, and represented, not half of the stock of the appellants, but all of it, and voted it all against the resolution, and protested against the sale in the name of all the stock. This not only appears from the testimony, but is also one of the allegations of the complaint. So that it appears ample notice was given, and all the notice that could have been given under the circumstances.

So that the question under consideration is, have the appellants been guilty of negligence in not more promptly bringing this action. The notice given to the stockholders was on May 23, 1906. The stockholders' meeting was on the 12th day of June, 1906, when the resolution of sale was ratified, approved, and confirmed. This action was brought on December 13, 1906, six months after the action complained of. It is the law of this state that the statute of limitations cannot be relied upon in a case of this kind, but that parties who are seeking equitable relief must proceed within a reasonable time. It is also established by the law generally that the right of a dissenting stockholder may be lost by laches. 2 Cook, Stockholders (3d ed.), par. 733. It is also stated, in the same authority:

"If it is evident that the stockholder is waiting to see whether the unauthorized act would be profitable to the corporation, the court will refuse to grant him any relief. So, also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed or money expended or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred."

That, it seems to us, is what was done in this case, though in a different way. It developed in the trial of the case that the Wright estate, in which the appellants are interested, was the owner of \$275,000 worth of bonds of the original com-

pany, viz., the Tacoma Gas & Electric Light Company, and that this investment was their real interest in this transaction, the fifty shares having been bought for the purpose of giving appellants a better opportunity to guard the interests of those bonds; and it plainly appears from the record that could these bonds have been sold to suit the appellants, this suit would not have been brought, and that the six months' time which intervened between the sale of the stock of the corporation and the bringing of this action was an experimental season on that question; that, therefore, the appellants brought themselves within the reason of the rule above announced. That large operations had been completed and a great amount of money expended and alterations made, is patent from the record in this case. Thousands of bonds were sold, and not less than a million dollars was involved. The rule is based upon the broadest principles of equity, and is intended for the protection of innocent purchasers. In cases of this kind, transactions are of great magnitude; bonds are bought by strangers in all stations in life; and to place innocent investors in peril, justice demands that prompt action should be taken.

As to the time that has elapsed, it is true that in most of the cases which are cited by the textwriters a longer period had elapsed in which it was held that the applicants for relief had been guilty of negligence. But the period must be determined by the circumstances of each particular case. This doctrine is laid down by the supreme court of the United States, in *Sullivan v. Portland etc. R. Co.*, 94 U. S. 806, 24 L. Ed. 324, where the court, in discussing this question, said:

"To let in the defence that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limita-

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tions is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly;"

quoting from *Smith v. Clay*, Ambler (Eng. Ch.) 645, where it is said:

"A court of equity, which is never active in giving relief against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court."

Under all the circumstances of this case, we think it would be inequitable to permit the appellants at this time to disturb the existing relations of the corporation.

The judgment of the lower court is therefore affirmed.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

[No. 7960. Department Two. May 26, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPPI CIMINI,
Appellant.¹

CRIMINAL LAW—TRIAL—ARREST OF JUDGMENT. A motion in arrest of judgment can only be based on the grounds specified in Bal. Code, § 6967.

CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL—DISCRETION. Under Bal. Code, § 6902, providing that the court may permit a plea of guilty to be withdrawn, the court should liberally exercise its discretion in favor of life and liberty, but a refusal can only be reviewed for abuse of discretion, and it is not an abuse of discretion to refuse leave to withdraw a plea, asked on the ground that immunity had been promised accused by a detective, where that fact is controverted and it appears that the accused was informed of his rights, knew the effect of his plea, and the prosecuting witness had disappeared and his whereabouts were unknown.

CRIMINAL LAW—JUDGMENT—RECITALS—APPEAL. Recitals in an order refusing to withdraw a plea of guilty import absolute verity on appeal as to matters that transpired before the judge.

CRIMINAL LAW—TRIAL—INTERPRETERS. It is not error, on receiving a plea of guilty, to appoint a city police detective as an interpreter; especially where the accused speaks broken English, and it appears from his conversation with the judge that he knew what the charge was and the effect of his plea.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. Upon an application to withdraw a plea of guilty, it is not prejudicial error to receive affidavits as to the guilt of the accused, as they are immaterial.

CRIMINAL LAW—APPEAL—REVIEW—MATTERS NOT BEFORE LOWER COURT. Upon appeal from an order refusing leave to withdraw a plea of guilty, entered in the court below when the prosecuting witness had disappeared, the supreme court cannot consider affidavits showing that the prosecuting witness had returned.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered November 21, 1908, upon a plea of guilty of robbery, after denying leave to withdraw the plea. Affirmed.

Wesley Lloyd and *Chas. E. George*, for appellant.

John L. McMurray and *A. O. Burmeister*, for respondent.

¹Reported in 101 Pac. 891.

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Opinion Per RUDKIN, C. J.

RUDKIN, C. J.—On the first day of June, 1908, the defendant was informed against in the superior court of Pierce county for the crime of robbery. On the same day he was arraigned before the court and entered a plea of guilty as charged. On the 8th day of June, 1908, leave was asked to withdraw the plea of guilty, on the ground that the defendant was induced to enter the plea by promises of immunity. The application was supported by his affidavit to the effect that he entered the plea because he was promised immunity from punishment by one James Milone, a police detective of the city of Tacoma, in case he should do so. The affidavit of the defendant was controverted by the affidavit of Milone, and on the 27th day of June, 1908, the application was denied, but the order denying the application was not signed or entered of record until November 21, 1908. On the 16th day of September, 1908, the defendant changed attorneys, and on the 18th day of September, 1908, a motion in arrest of judgment was interposed on the ground that no plea was ever entered, or if so, that it was so entered unwittingly, unknowingly, and under misapprehension. This motion was supported by the affidavit of the defendant and opposed by the affidavits of Milone and others. On the 21st day of November, 1908, the last-mentioned motion was denied, and on the same day judgment was entered on the plea of guilty. From this judgment, the present appeal is prosecuted.

It is a misnomer to call the second motion interposed by the appellant a motion in arrest of judgment, for under our statute, Bal. Code, § 6967 (P. C. § 2219), the only grounds for moving in arrest are the following:

“1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court. 2. That the facts as stated in the indictment or information do not constitute a crime or misdemeanor.”

It is manifest that the objections presented by this motion do not fall under either of these provisions. However, the

court below treated the motion in arrest as a renewal of the application to withdraw the plea, and this court will so consider it. If we did not take this liberal view of the question, the motion should be denied upon its face. The application to withdraw the plea was made under Bal. Code, § 6902 (P. C. § 2155), which provides that,

"At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted."

As the language of the statute implies, applications of this kind are addressed to the sound discretion of the trial court.

"It is wholly in the discretion of the court whether a plea of any sort may be withdrawn. Permission may always be granted, but unless an abuse of discretion is shown, the refusal of permission to withdraw a plea is not error." 12 Cyc. 350.

At the same time this discretion should be liberally exercised in favor of life and liberty. As said by the court in *People v. Miller*, 114 Cal. 10, 45 Pac. 986:

"Before judgment, the court may, at any time, permit this to be done (Pen. Code, § 1018), and the discretion thus vested is one to be liberally exercised. The law seeks no unfair advantage of a defendant, but is watchful to see that the proceedings under which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation his natural distress, and is considerate in viewing the motives which may influence him to take one or another course. Therefore, it will permit a plea of guilty to be withdrawn if it fairly appears that defendant was in ignorance of his rights and of the consequences of his act, or was unduly and improperly influenced either by hope or fear in the making of it. But the mere fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel to hope or believe, that he would receive a shorter sentence or a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by jury, presents no ground for the exercise of this liberal discretion . . . To hold that it did would be equivalent to saying that a defendant might speculate

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upon the supposed clemency of a judge, with a right to retract if, at any time before sentence, he began to think that his expectation would not be realized."

Guided by this rule, did the court below abuse its discretion? If the appellant entered his plea without hope or fear, without improper influence or promise, with full knowledge of his legal and constitutional rights and of the consequences of his act, the ruling of the court below should be affirmed. We deem it unnecessary to set forth in detail the affidavit filed in support of the motion in arrest. Suffice it to say, if that affidavit be true there was neither an arraignment nor a plea, for the conversation therein detailed is utterly foreign to such proceedings. But this affidavit was controverted by other affidavits and by the recitals of the trial judge as to what transpired at the time of the arraignment. The record shows that the court below,

"Became convinced that the said plea was entered by the said defendant with full knowledge and understanding of its effect and with full and complete knowledge of the crime with which he was charged, and with full and complete understanding of the defendant's constitutional rights under the law, and that the said plea was entered and made in good faith and not through any misapprehension or misunderstanding. And it appearing by said affidavits filed by the plaintiff that since the plea of guilty was entered by the defendant that the prosecuting witness in said case had disappeared and his whereabouts were unknown to the plaintiff, on the 21st day of November, 1908, the court entered an order overruling defendant's motion in arrest of judgment and allowed the defendant his exceptions."

In so far as these recitals relate to matters transpiring in the presence of the court they import absolute verity, and, in so far as they are based on extrinsic evidence, they are amply supported by the affidavits presented at the hearing. We will now refer to the different assignments of error in so far as they have not been foreshadowed by what has already been said.

It is contended that the court erred in appointing a police

detective of the city of Tacoma as interpreter at the time the arraignment was made. We know of no rule of law by which the detective was disqualified to act in that capacity by virtue of his office, and counsel has cited none. The court has found that the arraignment and plea were in all respects regular, and, in addition to what transpired between the court and the appellant through the interpreter, the record shows the following:

"That, however, before accepting said plea of guilty from the said defendant the court spoke to the defendant in English direct without an interpreter, and the defendant replied in broken English, and the court thereupon asked the said defendant in English if he was guilty of the crime charged in the information, and if he knew the effect of his entering a plea of guilty, and if he understood what he was doing. The said defendant thereupon replied in broken English substantially that he understood the effect of his plea, and knew what the court was saying to him, and that he committed the robbery alleged in the information. The court furthermore informed the defendant as to his rights to have counsel defend him without expense to himself, and fully informed him as to his rights under the law, both through the interpreter and direct. The defendant also stated to the court at said time of entering his plea of guilty, that he committed the offense while under the influence of liquor; that he was a married man and had a wife and family in Italy, and that he had committed the robbery in company with others. He also stated to the court that he had assisted in robbing a blind man who resided on "K" street in the city of Tacoma, Pierce county, Washington. That after the aforesaid conversation, and being satisfied that he knew the plea he was entering, and the full effect thereof, the court accepted the plea of guilty from the said defendant, and directed that the same should be entered."

Leaving the interpreter out of consideration, therefore, the record shows that the proceedings of the court were regular and proper.

It is next contended that the court erred in receiving or considering *ex parte* affidavits tending to show that the appellant was guilty of the crime charged. The question of

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the guilt or innocence of the accused was not an issue on the hearing of the so-called motion in arrest of judgment. The sole question to be determined under the motion was whether the plea was entered, and if so, was it entered unwittingly, unknowingly, or under misapprehension. When these questions were determined against the accused his guilt was established by the most satisfactory evidence known to the law, a confession in open court. The affidavits referred to were therefore immaterial, and their filing or consideration, if error, was not prejudicial.

The court found that the prosecuting witness had left the jurisdiction of the court, and that his whereabouts were unknown at the time of the hearing, and this fact the court had a right to consider on the hearing of the application to withdraw the plea.

“When an application is made in a criminal case to recall a plea of guilty and to plead *de novo*, it is a matter addressed to the discretion of the court. This has always been the doctrine prevailing from the earliest times in this state. Any other rule would be replete with mischief. By its force a defendant could plead guilty, and then, after the witnesses on the part of the state had been discharged, could come into court, and claim as a right to take back his confession and guilt and put the state to its proof. Fortunately, such is not the practice. When the defendant in this case asked to plead anew, the application was addressed to the discretion of the court.” *Clark v. State*, 57 N. J. L. 489, 31 Atl. 979.

The appellant filed an affidavit in this court before the hearing, stating that at the time the affidavits were filed in the court below the whereabouts of the prosecuting witness were unknown, and that search for him was made without avail, but that since that time the prosecuting witness has returned to the city of Tacoma and now resides there. This affidavit cannot be considered, as the cause must be heard here on the record made up in the court below. But in any event, the affidavit corroborates the affidavits filed by the state as to the absence of the prosecuting witness at the time

the application to withdraw the plea was heard, and if the order was justified then it is justified now. If regular and valid when made its validity cannot be made dependent on the migrations of the prosecuting witness. The court below carefully and judiciously safeguarded every right of the appellant, and its judgment is affirmed.

CROW, DUNBAR, MOUNT, and PARKER, JJ., concur.

[No. 7542. Decided May 26, 1909.]

MONTANA STABLES, *Respondent*, v. UNION ASSURANCE
SOCIETY OF LONDON, *Appellant*.¹

INSURANCE—POLICY—PROPERTY COVERED—ADDITION ATTACHED—CONSTRUCTION. A policy of fire insurance upon a stable, "and additions attached thereto," covers an extension of the main floor excavated underneath an alley at the rear and the basement of a building across the alley on higher ground, used for horse stalls and the storage of vehicles; since "attached" has the meaning of "connected" or "joined to," and the policy is to be construed most strongly against the company.

Appeal from a judgment of the superior court for King county, William Parmerlee, Esq., judge *pro tempore*, entered March 27, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a policy of fire insurance. Affirmed.

Granger & Magill, for appellant.

Farrell, Kane & Stratton, for respondent.

FULLERTON, J.—This action was brought by the respondent against the appellant, to recover on a fire insurance policy. There is no question as to the loss, nor the amount of the loss, the defense being that the property destroyed was

¹Reported in 101 Pac. 882.

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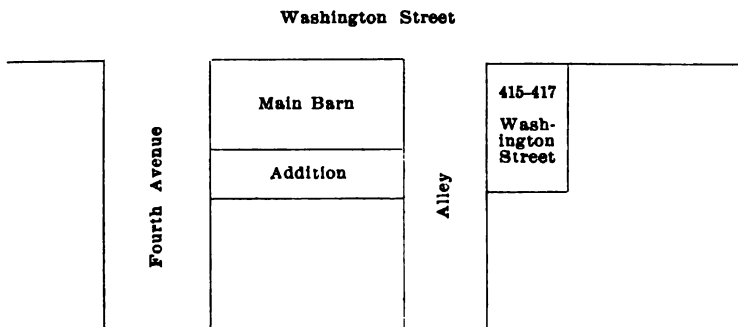
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not covered by the policy. The property insured was described in the policy as follows:

"\$1500 on the two story frame building, and additions attached thereto, including electric lights, wiring, plumbing and all permanent improvements, occupied as a livery, boarding and sales stable, situate on the southeast corner of Washington street and Fourth Avenue, Seattle, Washington."

The street called Washington street in the policy extends east and west, and Fourth Avenue is a street running at right angles thereto. The main barn of the respondent is a two-story structure built at the junction of the two streets, and extends south along Fourth Avenue probably 100 feet, and east along Washington street to the alley in the middle of the block. On the south side of the barn, extending from Fourth street to the alley, is a one-story addition to the main barn. Washington street as it proceeds east from Fourth Avenue rises rapidly, so that the building erected on the lot immediately to the east of the alley, known in the record as 415-417, Washington street, had its first story on a level with the second story of the respondent's main building. The respondent leased of the owner of this building the right to use the space under the building in connection with its barn, and thereafter excavated the same to a level with the lower floor of its main building, and erected therein single and box stalls which it used for stabling horses. The stable is reached through the alley by an excavation made between the main barn and the stable on a level with the floor of each. The record is not clear as to how much of this alley is excavated, but we gather therefrom that the excavation extends for the full width of the building, making practically one continuous floor from the main entrance on Fourth Avenue back to the farther side of the excavation under the Washington street building. The alley was covered with planking which formed at once a roadway at its original level and a roof for the space excavated beneath, this space being used for

the storage of vehicles. The following diagram may help to make clear the situation:



The fire started in the Washington street building, destroying entirely that part of the barn, and doing slight damage to the addition on the south side of the main barn.

The contention of the appellant is that the part of the barn in the basement of the Washington street building is no part of the main barn itself, nor an "addition attached thereto" within the meaning of the policy, and hence is not covered by the policy. But we think it clear that the phrase "addition attached thereto" described the property destroyed by the fire. The word "attached" has the meaning of "connected with" or "joined to," in the sense of which it is used in the policy, and it cannot be disputed that this addition to the main barn was connected and joined to the main barn; indeed, so clearly so as to make it almost an integral part of the main barn itself. It must be remembered, moreover, that in the interpretation of insurance policies where any uncertainty exists in the description of the property insured, the uncertainty must be resolved in favor of the insured. As was said by Vann, J., in *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 48 N. E. 751, 61 Am. St. 627, 39 L. R. A. 433:

"The policy, although of the standard form, was prepared by insurers, who are presumed to have had their own in-

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terests primarily in view; and hence, when the meaning is doubtful, it should be construed most favorably to the insured, who had nothing to do with the preparation thereof."

So in this case, if it were doubtful whether the description contained in the policy covered the property destroyed, it would be our duty to resolve that doubt in favor of the insured. The appellant cites the following cases, and maintains that they are absolutely decisive in its favor of the question involved; viz: *Franklin Fire Ins. Co. v. Hellerick*, 20 Ky. Law 1703, 49 S. W. 1066; *North British etc. Ins. Co. v. Tye*, 1 Ga. App. 380, 58 S. E. 110; *Liebenstein v. Aetna Ins. Co.*, 45 Ill. 303.

In the first of these cases the property described was a "brick, metal-roofed building, including frame addition situate No. 216, on the west side of First street, between Main and Market streets, Louisville, Ky." The proof showed that the insured owned and occupied a brick, metal-roofed building at the place described, which had a frame addition attached thereto; that the policy as originally written did not contain the words "including frame addition," but that these words were added by an agent after the policy had been delivered, so as to make it cover the frame addition. The proof showed also that the insured owned another building, situated west of the main building and about 20 feet therefrom, not connected with it in any manner, in which was stored lumber and material. This latter building was destroyed by fire, and the court held it was not included in the policy.

In the second case, the suit was upon two policies of insurance covering a two-story frame structure used by the insured as a dwelling house, and "additions thereto," as described in one of the policies, and "its additions adjoining and communicating" as described in the other. The building destroyed was a small servant's house 150 feet away, connected with the dwelling by two wires operating an electric call bell. The latter building was destroyed by fire, and the court held it not to be within the policy.

In the third case cited, it was held that a policy of insurance on a stock "contained in the two-story frame building occupied by the assured as a chair manufactory, situated on the north side of Superior street," etc., did not include a stock kept in an adjoining building, although owned by the same company. These cases, it seems to us, if we concede them to be correctly decided, are clearly distinguishable from the case at bar. In the first two, the buildings destroyed were separate structures in no manner a part of the building insured, and cannot be said to be either additions to the insured building or connected with it. In the third case, the insurance was upon stock contained in a particular building, and it was only by a distortion of the phraseology of the policy could it be held to include a stock contained in another building. But in the case at bar, there was such a connection between the building destroyed and the building described in the policy as to be "an addition attached thereto," and to leave no doubt that it was understood by all of the parties to be covered by the policy.

There is no error in the record, and the judgment will stand affirmed.

RUDKIN, C. J., CHADWICK, GOSE, CROW, MOUNT, and DUNBAR, JJ., CONCUR.

PARKER and MORRIS, JJ., took no part.

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Opinion Per MOUNT, J.

[No. 7676. Decided May 26, 1909.]

FRANCIS M. RYAN, *by his Guardian Ad Litem M. Ryan,*
Appellant, v. NORTHERN PACIFIC RAILWAY COMPANY
*et al., Respondents.*¹

MASTER AND SERVANT—YOUTHFUL EMPLOYEE—CONTRIBUTORY NEGLIGENCE. A boy about seventeen years of age, learning the position of call boy in and about freight yards, is guilty of contributory negligence, as a matter of law, in attempting to cross a string of freight cars in the yard when there was a safe way around them, knowing that switching was going on and that the cars were liable to be moved at any time, and he evidently realized the danger; and where for two years he had been working on his own account, and was a man in experience.

SAME—NEGLIGENCE OF MASTER—FAILURE TO WARN—RAILROADS—SIGNALS. In such a case the company is not guilty of negligence in sending the boy into private switch yards where none but employees were allowed, without warning him, nor in switching cars without whistles and signals which would only create confusion in the yards.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 4, 1908, in favor of the defendants, by direction of the court, after a trial before the court and a jury, dismissing an action for personal injuries. Affirmed.

Vince H. Faben and *S. H. Kelleran*, for appellant.

Carroll B. Graves, for respondents.

MOUNT, J.—This action was brought by a minor, through his father as guardian *ad litem*, to recover damages on account of personal injuries received while in the employ of the Northern Pacific Railway Company. The cause was tried to the court and a jury. At the close of the evidence, the court sustained defendants' motion for a directed verdict, and dismissed the action. The plaintiff appeals.

There is no dispute in the evidence. The facts are, in substance, as follows: The appellant, Francis M. Ryan,

¹Reported in 101 Pac. 880.

was employed by the respondent company as call boy in its freight yard office in Seattle, to take the place of one Harvey Kelly who desired a leave of absence for a short time. The employment of the appellant was obtained upon the recommendation of an older brother who was at that time employed as a clerk in the freight office. At the time of his employment, which was August 21, 1906, the appellant was sixteen years and ten months of age. He was small for his age, but was a strong, healthy boy. He was directed to follow Mr. Kelly, who would show him and tell him about what his duties were, and he was to take Kelly's place, and his pay was to begin when Kelly should quit.

During the afternoon of August 21 and the day of the 22d, and up until about four o'clock of the 23d of August, 1906, the appellant followed Kelly around and was shown his duties, which were to deliver messages, bills, orders, etc., to the different freight offices in Seattle, and to call crews for the trains when directed. The clerks in the yard office deposited in a box kept for that purpose the messages and orders to be delivered by the call boy. There were six clerks in this office, and all their work was in connection with the freight yards. These yards were upon the private property of the respondent company. They were not crossed by any public streets, and no one was permitted therein except employees. The yards were used for storing freight cars, for breaking up trains arriving, and for making up trains to leave the city. All of the freight trains of the respondent company were handled in these yards by switch engines. There were twenty-one switch and storage tracks, each holding about fifty cars, and there were usually from eight hundred to a thousand cars in the yard. Over these tracks there were operated at all times, both day and night, from six to twenty-three switch engines. Each switch engine had its own crew, consisting of five men, viz: an engineer, fireman, foreman, and two helpers. These crews received their orders from the yard office, and each had a separate district to

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work in. They governed themselves by silent signals, given by the hands during the day and by lanterns at night. Cars were continually being taken out of storage tracks and shunted therein, without notice or warning of any kind.

On August 23, 1906, at about four o'clock in the afternoon, the call boy, Mr. Kelly, and the appellant had made the rounds of the offices and delivered their messages and orders, when Kelly was requested by one of the clerks in the yard office to tack some cards on certain cars in the yard. This work was properly the work of the car checkers and not of the call boy. Kelly, however, agreed to do this as an accommodation to the clerk, thinking it would be a service to the company. When Kelly started with the cards, the appellant followed him. They went around the cars of the yard to the track where the cars were which were to be carded. These cars were standing on a track known as No. 5. After Kelly had tacked the cards on the cars and appellant had watched him do so, the two boys started to return to the office. While on their way, they came to a string of about a dozen cars standing on track known as No. 14. Kelly started to go around this line of cars the way they had come, but, upon the suggestion of the appellant that it would be nearer to cross over the cars, they undertook to do so. Kelly went through first, but as the appellant was in the act of passing through, a car was shunted onto that track against the string of cars, and appellant was thrown off the car which he was attempting to cross, and his right leg was run over by the car, necessitating amputation below the knee. The way around the cars and the way the boys went in was perfectly safe. From where the boys started to cross the cars they could not see the end of the line where the switch engine was working; but if they had stepped back ten or fifteen feet they could have seen the switch engine.

The appellant had been working for a period of about two years, free from parental control. He worked for one year in the Post-Intelligencer office at eight dollars per

week. Thereafter he worked at the plumber's trade for eight months, and qualified himself as a plumber, but was not permitted to work at his trade because he was not then old enough to join the union. Thereafter he obtained employment in a shingle mill some distance out of Seattle, at two dollars per day, where he worked for a short time, and soon thereafter sought employment as a call boy with respondent company. He knew the system of switching the cars in the yard, although he said that was his first trip into the yard. He knew that the switch engines were continually shunting cars into the switches and taking them out. He knew there was a safe way back to the office the way they had come out and that there was nothing to prevent returning that way. He evidently realized the danger in crossing the cars, because he said there was danger in crossing the tracks at the end of the cars. Upon these facts the trial court was of the opinion that there was no negligence of the company shown, and that appellant assumed the risk of crossing the cars, and therefore directed a verdict for the respondent.

If the appellant in this case had been an adult, there can be no reasonable contention that he was not guilty of contributory negligence in attempting to cross a string of cars which he knew, or should have known, were liable to be moved at any time; especially when he was not directed to cross them, and when there was no necessity therefor, and when there was a safe way around the cars. But it is contended by the appellant that, because he was a boy, the question of his capacity and intelligence must be left to the jury, and several cases decided by this court are cited to that effect, among which are *Lorence v. Ellensburgh*, 13 Wash. 341, 43 Pac. 20, 52 Am. St. 42; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869, and *Kirby v. Wheeler-Osgood Co.*, 42 Wash. 610, 85 Pac. 62. In the first two of these cases the minors were mere children, one eight and the other twelve years of age. In the last-named case, the minor was

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just entering upon his sixteenth year. In that case we said, at page 613:

“There is a time when a child is so young that the court can say, as a matter of law, that to employ him around dangerous machinery without fully instructing him as to the open and apparent dangers would be the grossest kind of negligence. So there comes a time in this same child’s life when the court can say, as a matter of law, that a failure to warn him of the open and apparent dangers is not negligence. Between these two extremes, however, there is, and from the nature of things there must be, a debatable ground—a time when the inferences to be drawn from the fact are disputable—when the court cannot say as a matter of law that the omission to warn is or is not negligence. In such cases it is the province of the jury to draw the inference, and either party has the right to have the question submitted to them.”

This is a clear statement of the rule in such cases. In that case we held, on account of the youth and inexperience of the boy, the question of assumed risk was one for the jury. But in this case, while the minor was a boy not quite seventeen years of age, he was a man in experience, and appears from his own testimony to have fully appreciated the danger. He, therefore, comes within the rule, “when the court can say, as a matter of law, that a failure to warn him of the open and apparent dangers is not negligence.”

It is argued that the respondent was guilty of negligence on account of the manner in which the cars were handled in the yard, and for employing an inexperienced boy and assigning him to a dangerous place without warning him of the danger, and in directing him to follow Kelly without warning him especially of the dangers. The freight yards of the respondent were private yards. No one but employees were permitted therein. Any one knowing how the yards and cars were operated did not need any further warning. The fact that whistles were not sounded and bells were not rung did not tend to show negligence, because under the conditions there, where numerous engines were running backwards and

forwards, such sounds would only create confusion, and would afford no protection. No one was supposed to be about the cars except employees, who necessarily would know, immediately upon entering the yards, that cars were liable to be moved at any time without any warning. Even if the appellant was directed to go into the yards, he knew of the conditions and the places where he would be safe; and if he knew it was dangerous to cross a track where cars were not standing, as he testified he did, he must necessarily have known it was much more dangerous to cross over cars standing on such tracks. In view of the age and experience of the appellant as shown by his own evidence, we see no escape from the conclusion that his own negligence was the cause of his injury.

It is unnecessary to refer to the many authorities cited in the brief of both the appellant and respondents, for the rule is, where there is no dispute in the facts and where the court is satisfied that the appellant was a man in experience and understanding, as appears in this case, it is then the duty of the court to decide, as a matter of law, that a failure to warn him of apparent danger is not negligence. The trial court did so decide in this case. The judgment must therefore be affirmed.

RUDKIN, C. J., CROW, GOSE, FULLERTON, and CHADWICK, JJ., concur.

MORRIS and PARKER, JJ., took no part.

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Opinion Per MOUNT, J.

[No. 7806. Decided May 26, 1909.]

ROBERT WETZLER, *Respondent*, v. E. D. NICHOLS *et al.*,
Appellants.¹

DEEDS—DESCRIPTION—SUFFICIENCY—LATENT DEFECTS—EXTRINSIC EVIDENCE. Where an addition contained twelve blocks numbered from 1 to 12 consecutively, each consisting of sixteen lots numbered from 1 to 16 consecutively, a deed of lots 7 and 8 in said addition is not void for uncertainty, as between grantor and grantee, where the grantors owned no lots 7 and 8 in said addition except in block 5, since the defect is latent and is explainable by extrinsic evidence.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—RECORD—NOTICE. The record of a deed of lots 7 and 8 in an addition without specifying the block is sufficient to put a subsequent purchaser on notice, where the grantors only owned lots 7 and 8 in block 5 of the addition, and where an inquiry of the grantor or grantees would have disclosed that the grantees were claiming the lots under such deed.

Appeal from a judgment of the superior court for King county, W. H. White, Esq., judge *pro tempore*, entered May 19, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Chas. M. Fouts and *Kitt Gould*, for appellants.

Roberts & Hulbert, for respondent.

MOUNT, J.—This action was brought by the plaintiff to remove a cloud from the alleged title to lot 8, in block 5, Cove addition to Seattle. The defendants, E. D. Nichols and wife, allege the title in themselves to an undivided one-half interest in this lot, and pray for a partition thereof. After a trial, the court found that the plaintiff was the owner in fee, and that defendants were not innocent purchasers and had no interest in the lot. A decree was entered quieting the plaintiff's title. The defendants have appealed from that decree.

The facts are as follows: It is conceded that the respond-

¹Reported in 101 Pac. 867.

ent is the owner of an undivided one-half interest in the lot, acquired by mesne conveyances from the heirs of the Noah Flickinger estate. The other half of the lot was conveyed by the heirs of said estate to J. W. Rayburn, and by Rayburn, without consideration, to his step-son, W. G. Alexander. Thereafter, on June 4, 1907, J. W. Rayburn and wife and W. G. Alexander intended to convey lots 7 and 8, in block 5, Cove addition to Seattle, to one M. M. Gleason, but the scrivener who prepared the deed, when writing the description in the blank form of the deed, described the lots as follows: "Lots seven (7) and eight (8) in Cove addition to the city of Seattle, Washington." This deed was executed, delivered, and filed for record on the same day. Respondent, by mesne conveyance, acquired the whole interest of M. M. Gleason in the lot. In the month of July following the execution of the deed of June 4, it was discovered that the description in the deed of June 4 was deficient because the block number was not stated. The scrivener who prepared the deed thereupon prepared another one, properly describing the property, and then requested Mr. Rayburn to execute the same for the purpose of correcting the former deed. Mr. Rayburn refused to do so unless he was paid the sum of \$200. He afterwards contended that lot 8 should not have been included in the deed, and finally prepared a deed himself, describing the property as follows: "Lot seven (7) in block 5, in Cove addition to the city of Seattle in said county and state. This deed is made for the purpose of correcting a mistake in that certain deed made by said first parties to said second party on the 4th day of June, 1907, and recorded on the 4th day of June, 1907." This deed was executed, delivered, and recorded on August 21, 1907, with the understanding when it was delivered that the owners of lot 8 would "fight it out" with him as to that lot. Thereafter, on September 19, 1907, W. G. Alexander, for a consideration of \$500, conveyed an undivided one-half interest in lot 8, in block 5, to the appellant E. D. Nichols, who now claims to be an

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innocent purchaser without notice of the claim of the respondent.

Cove addition to Seattle contains twelve blocks, numbered from 1 to 12 consecutively, and each block contains sixteen lots, numbered from 1 to 16 consecutively. It is conceded that all conveyances with reference to lots 7 and 8 in Cove addition, in which either Mr. Rayburn or Mr. Alexander was interested, referred to block 5 of that addition, and that they never had any interest in any block in this addition except block 5. The conveyances above referred to were all of record when appellant Nichols purchased the undivided one-half interest in the lot in question. The controlling questions in the case are: Was the deed of June 4, 1907, above referred to, void for uncertainty? If not void, was that deed sufficient to put the appellant Nichols upon notice? The deed of June 4, 1907, executed by Rayburn and wife and Alexander, describes the property as "lots seven (7) and eight (8) in Cove addition to the city of Seattle." There appears to be no fatal defect upon the face of this deed, or of the description. If Cove addition consisted wholly of lots or wholly of numbered tracts, this description is clearly sufficient to convey the lots 7 and 8 therein mentioned. We must, therefore, look outside of the deed itself to find any uncertainty or irregularity or infirmity. It follows that the infirmity in the deed, if any at all existed, is a latent and not a patent one, and subject to explanation by parol evidence. 1 Ency. Evidence, p. 844.

In *Newman v. Buzard*, 24 Wash. 225, 64 Pac. 139, this court said:

"Parol evidence is, and must of necessity be always, admissible to identify the property described in and conveyed by a deed, to ascertain to what property the particulars of description in the deed apply."

Looking outside of the deed, the facts appear that Cove addition to Seattle consists of twelve blocks; that each block contains sixteen lots, numbered from 1 to 16 inclusive. There

were therefore twelve lots in that addition numbered 7 and 8. If the grantors in the deed had owned other lots numbered 7 and 8 in other blocks, it would then be impossible to tell which lots were intended to be conveyed. But it appeared in this case that the grantors in the deed owned an undivided interest in lots 7 and 8, in block 5, and that they owned no interest in any other lots 7 and 8 except those of block 5 of Cove addition.

In *Dougherty v. Purdy*, 18 Ill. 206, it was said, at page 208:

“When an ambiguity is duly made to appear by the introduction of proof outside the deed, it is a latent ambiguity, and may be explained in the same way that it is shown. If the deed purport to convey black acre, and it is shown that there are two tracts of land known by that designation, the mind is sufficiently satisfied as to which is meant, by showing that the grantor owned one of those tracts, for the presumption then is that he intended to convey the tract which he owned, rather than the one which he did not own.”

In *Smith v. Crawford*, 81 Ill. 296, it was said:

“ . . . a devise or grant will only be held void for uncertainty, where, after resort to oral proof, it still remains a matter of mere conjecture what was intended by the instrument.”

See, also, *Langert v. Ross*, 1 Wash. 250, 24 Pac. 443; *Carson v. Railsback*, 3 W. T. 168, 13 Pac. 618; *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250.

Considering the facts above stated in the light of this rule, it appears certain that the grantors intended to convey lots 7 and 8, in block 5, Cove addition to Seattle, and that as between the grantors and the grantee in the deed of June 4, 1907, the whole interest of the grantors was conveyed to the respondent.

The question remains: Was this deed sufficient to put a subsequent purchaser upon notice? We think it was. The record showed that Rayburn and Alexander owned no interest in any other lots numbered 7 and 8 in this addition.

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They had deeded these lots away and the deed was of record. An inquiry of Rayburn would have revealed the fact, or an inquiry of his grantee would have disclosed, that the grantee or her successors in interest were claiming the lots by virtue of the deed of June 4, 1907, and intended to "fight it out" with the grantor. In *Sengfelder v. Hill*, *supra*, this court said, at page 379:

"When an intending purchaser searches the records to ascertain the state of the title, and finds a deed of record, good on its face, made by a common grantor, he cannot with impunity ignore it simply because he fails to find of record any property to which the given description is applicable, but must inquire outside of the record whether or not there was at the time the deed was made property to which the description can be applied, and whether the deed conflicts with the title to the property he intends purchasing. If he fails to so inquire, and such deed afterwards proves to affect property he has purchased, he must be held to have purchased with constructive notice."

And in *Deering v. Holcomb*, 26 Wash. 588, 598, 67 Pac. 240, 561, quoting from a decision of the supreme court of the United States, this court said:

"Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

See, also, *Dormitzer v. German Savings & Loan Ass'n.*, 23 Wash. 182, 207, 62 Pac. 862, particularly on page 218; *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675.

The deed of June 4, above referred to, which was standing of record, even if it was not notice of itself, was alone sufficient to put the appellant upon inquiry as to whether Rayburn and Alexander had not parted with all their title. It follows that the appellants were not purchasers without notice, and therefore acquired no interest in the lots in question as against the respondent.

The judgment of the lower court must therefore be affirmed.

RUDKIN, C. J., CROW, GOSE, FULLERTON, and CHADWICK, JJ., concur.

DUNBAR, MORRIS, and PARKER, JJ., took no part.

[No. 7856. Decided May 26, 1909.]

MAUDE MARTIN *et al.*, *Respondents*, v. EMPIRE STATE
SURETY COMPANY, *Appellant*.¹

INDEMNITY—CONTRACTOR'S BOND—NOTICE OF ACTS INVOLVING LOSS—RELEASE OF SURETY. A bond guaranteeing the performance of a building contract, which stipulates for immediate notice of any breach of the contract, does not require notice of every act constituting a default, but the owner may wait until claimants seek to make their claims charges against the property.

SAME—ACTIONS ON BOND—ACCRUAL—DATE OF FIRST BREACH—WAIVER—LIMITATIONS. A contractor's bond providing that action must be instituted within six months after the first breach of the contract does not require suit within such time upon any breach that is waived by the owner without prejudice to the surety; and the owner may wait until claims are sought to be made liens upon the property, tender the defense of the actions to the surety, and later sue to recover the judgment paid and expenses.

SAME—AGREEMENT ALTERING CONTRACT. A surety on a contractor's bond is not released by a secret understanding between the owner and contractor to the effect that the owner might desire an accommodation by acceptance of a mortgage, in lieu of the last payment; especially where the contractor defaulted and payment was made in cash.

SAME—RELEASE OF SURETY—FAILURE TO MAKE PAYMENT. A surety on a contractor's bond cannot claim a release by the owner's failure to make a payment due the contractor, when it does not appear that the payment was demanded or any certificate presented therefor, or that failure to pay caused the contractor's default.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 30, 1908, upon findings

¹Reported in 101 Pac. 376.

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in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action upon an indemnity bond. Affirmed.

Hayden & Langhorne and *John P. Hartman*, for appellant.

Blattner & Chester and *L. B. da Ponte*, for respondents.

DUNBAR, J.—The respondents let a contract to defendant Duff, to erect an apartment house in Tacoma for the agreed consideration of \$11,628, which contract required a bond for the performance of the contract in the sum of \$2,500, which was executed with appellant as surety. The contract and bond are both made a part of the complaint and are exhibits in the case. The contractor Duff permitted bills to go unpaid for materials and labor, and liens were filed, part of which were foreclosed; so that, after allowing the full amount of the contract price, there was still due \$3,642.64. Actions were commenced to foreclose the liens above mentioned and, upon the commencement of the action, defendant Duff and the Empire State Surety Company were notified of the pendency thereof and requested and required to defend the same. But the defendants failed to defend said cause, and plaintiffs were obliged to, and did, defend the same, and such proceedings were had that judgment was rendered against the plaintiffs in the sum of \$2,650, and the property was ordered sold. The complaint alleges certain expenses, including attorney's fees and other expenses incident to the suit, and this suit was brought to recover against the appellant the sum of \$2,500, the amount it was liable for on the bond. Demurrer was filed to the complaint, which was overruled. The cause was tried, and judgment was rendered as prayed for.

Exceptions are taken to many of the findings of fact, but from an examination of the record, we conclude that the findings were justified by the testimony in the case. So that there is practically nothing left but the questions of law in-

volved, the main contention being that the judgment should be reversed because the respondents did not give notice of the breach of the contract immediately after the occurrence, to wit, about August 1, 1907, and that the appellant was therefore discharged from liability on the bond; and second, because the action was not commenced within six months after the time of the first breach, or at least from the notice thereof, which would be six months from August 27, 1907, the action having been commenced in March, 1908. The first lien was filed on October 18, 1907. Prior to this, however, on August 22, 1907, the architect gave written notice to the appellant of the contractor's default, and in a few days the agent of the appellant, Mr. Church, called on the architect and said that respondents had violated the contract, and that the appellant claimed to be relieved of any liability.

So far as the question of notice is concerned, this case falls within the decision in the cases of *Denny v. Spurr*, 38 Wash. 347, 80 Pac. 541; *Ovington v. Aetna Indemnity Co.*, 36 Wash. 473, 78 Pac. 1021, and *Heffernan v. United States Fidelity & Guaranty Co.*, 37 Wash. 477, 79 Pac. 1095. It is conceded by the appellant that these cases are controlling if adhered to, but it is urged that they do not state the law and should therefore be overruled. We are not convinced from any argument presented that the rule announced in the causes referred to should not be adhered to. The question raised with reference to the commencement of the action is also *stare decisis* in this state. *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794; *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052; *Ovington v. Aetna Indemnity Co.*, *supra*. The doctrine announced in those cases is too well established to be longer questioned.

There is also a contention that there was a secret understanding between Duff and respondents, which made a different liability from that assumed by appellant; that therefore a fraud was practiced against appellant that released it from its obligation, viz: that the respondents had made arrange-

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ments with Duff and that when he had completed the work specified in the contract, respondents might want him to accommodate them by taking a second mortgage for such sum as might be due him. This was in no sense a contract, and was not binding on Duff, and never was carried into effect. So that it plainly appears that appellant was in no wise injured. It could not in the nature of things, as shown by the testimony, have been carried into effect, because, at the time anticipated by the respondents when they would require the favor, the contractor was delinquent, and the entire contract price was paid in cash.

There is also a suggestion that the respondents had violated the contract by not making a payment of some \$286 to the contractor at the time it was due. But there is nothing in the testimony to show that the certificate was ever presented for payment, or that the want of payment was the cause in any manner or in any degree of the failure of the contractor to finish the building according to the agreement. The testimony, however, on the other hand, shows that Duff, the contractor, did not even know that this payment had not been made until after he abandoned the contract.

The complaint states a cause of action. The appellant entirely failed to show that it had been injured in any respect whatever by any action of the respondents, and the judgment is therefore affirmed.

ALL CONCUR.

[No. 7930. Decided May 26, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. LEE WING WAH, *Appellant*.¹

APPEAL—STATEMENT OF FACTS—AFFIDAVITS—CONTINUANCE. An appeal will be dismissed where the only error assigned is in the refusal to grant a continuance, and the affidavits used are not brought up for review by a bill of exceptions or statement of facts.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered August 20, 1908, upon a trial and conviction of the crime of manslaughter. Appeal dismissed.

Bugge & Swartz, for appellant.

Virgil Peringer and *George Livesey*, for respondent.

DUNBAR, J.—The defendant, a Chinaman, was informed against May 2, 1908, for the crime of murder in the first degree. May 18 a plea of not guilty was interposed. On May 23, the defendant filed a special plea of mental irresponsibility. On the said day the case was assigned for trial on June 1, 1908. On May 28, the defendant, through counsel, moved to vacate the assignment for June 1, and for a continuance over the term, or to such later date in the term as would enable counsel to prepare for trial, basing the motion on the record in said cause and the affidavit of one of defendant's counsel. This motion was denied. The defendant excepted. Thereafter, on June 1, the case was tried before a jury, who returned a verdict for manslaughter. Sentence was imposed, and defendant appeals to this court from the judgment and proceedings.

The only assignment of error is that it was prejudicial error for the court to deny the continuance asked by the appellant, the result of which was to deny the appellant a fair trial. The usual assignment, that the court erred in denying

¹Reported in 101 Pac. 873.

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defendant's motion for a new trial, appears, but it is based upon the first assignment. The respondent moves to dismiss the appeal here, upon the ground that it appears that the sole error claimed and relied upon in this appeal is the failure of the court to grant appellant a continuance, and that it further appears that there is no bill of exceptions or statement of facts in the record. This motion must be sustained. In the early cases of *Windt v. Banniza*, 2 Wash. 147, 26 Pac. 189, and *Spokane Falls v. Curry*, 2 Wash. 541, 27 Pac. 477, it was held that affidavits not being made a part of the record by statement or bill of exceptions could not be considered. The same doctrine was announced in *Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543, 45 Pac. 141, the court there saying:

"There is nothing to show that they [the affidavits] were all presented or read to the court below on the hearing of the motion, and in order to entitle them to consideration here the fact that they were so presented should have been certified to by the court in some manner, and the motion to strike them is granted."

In *State v. Howard*, 15 Wash. 425, 46 Pac. 650, the same doctrine was announced, the court, in the course of its opinion, saying:

"It is not enough that such papers have been filed by counsel with the clerk of the superior court . . . The act of filing is *ex parte* and all such papers (other than the technical record or judgment roll) upon which reliance is had in this court, or to which the attention of this court is to be directed upon appeal, should be brought into the record by an appropriate bill of exceptions or statement of facts."

The same doctrine was announced in *Jacobson v. Lunn*, 16 Wash. 487, 48 Pac. 237; *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 717; *State v. Anderson*, 20 Wash. 193, 55 Pac. 39, and *Armstrong v. Van De Vanter*, 21 Wash. 682, 59 Pac. 510.

It is true that, in *State v. Vance*, 29 Wash. 435, 70 Pac. 34, an affidavit which was not incorporated in the statement of facts was admitted and considered by this court. But that

was because the court found that the affidavit was an integral part of the motion made for the continuance, and further found that it appeared from the statement of the court that the court had actually considered the affidavit with the other testimony sent up in the statement of facts. The order of the court in that case expressly recited that the court had read the affidavit in support of the motion. But in this case there is no statement of facts whatever and, while it is true that the motion states that it is based upon an affidavit, if we should concede that the court considered that affidavit, there is nothing to show that other affidavits and other proofs were not taken into consideration by the court in determining the motion; and we have uniformly held that a judgment of a trial court would not be disturbed where all the testimony upon which the court acted was not before this court for inspection. The case of *State v. Vance, supra*, was distinguished in *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487, where it was again held that, on an appeal from an order overruling a motion to vacate a judgment, affidavits in support thereof will not be considered when not incorporated in the record by bill of exceptions or statement of facts. The cases were again reviewed and it was there said, in speaking of the *Vance* case, that there was no intention on the part of this court in that case to change the rule laid down in the cases above cited. The doctrine is firmly established in this state that all the testimony upon which the court acted must be brought to this court before the alleged error of the court will be reviewed.

The motion to dismiss will have to be sustained.

ALL CONCUR.

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[No. 8075. Department Two. May 27, 1909.]

SARAH THOMAS, Respondent, v. LOUIS THOMAS, Appellant.¹

MARRIAGE—VALIDITY—PRESUMPTION. All presumptions both of law and fact will aid findings of fact in support of the validity of a marriage.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 5, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for divorce. Affirmed.

Blaine, Tucker & Hyland, for appellant.

Roberts, Battle, Hulbert & Tennant (C. J. France, of counsel), for respondent.

DUNBAR, J.—This is an appeal from a judgment for divorce, the only contention being that the former husband of the respondent, plaintiff in this action, was not dead at the time of the alleged marriage of appellant and respondent. The testimony is brief and presents a plain conflict. The rule of presumption in cases of this kind is thus expressed in 1 Bishop, Marriage & Divorce (5th ed.), § 457:

“It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in its nature matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all presumptions both of law and of fact, presses into its service all things which can help it in each particular case, to sustain marriage and repel the conclusion of unlawful commerce.”

Aided by this presumption, we think the court was justified in holding that the marriage was a legal one, and in rendering the decree which it did enter. Affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

¹Reported in 101 Pac. 865.

[No. 7947. Department Two. May 27, 1909.]

JOHN H. BUNCH, *Appellant*, v. PIERCE COUNTY *et al.*,
Respondents.¹

JUDGMENT—BAR—RES JUDICATA—MATTERS CONCLUDED. The denial of a motion to vacate a judgment, upon the ground of inadvertence and surprise, from which no appeal was prosecuted, is *res judicata* in an action in equity to set aside the judgment upon the same grounds.

JUDGMENTS—ACTIONS TO SET ASIDE—LIMITATIONS—EXCUSE. An action in equity to set aside a judgment must be brought within one year, and it is no excuse that plaintiff mistook his remedy until after the year had expired.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 19, 1908, in favor of the defendants, dismissing an action to vacate a tax foreclosure judgment and tax sale, after a trial before the court without a jury. Affirmed.

E. L. Culver, for appellant.

Wm. H. Pratt, for respondents.

DUNBAR, J.—A tax judgment was entered in the superior court of Pierce county, on the 5th day of December, 1906, which affected the land in controversy. Pursuant to this judgment, the county treasurer sold the property to the respondent Traders Trust Company, a corporation, and delivered a tax deed therefor. On the 27th day of May, 1907, the appellant moved to vacate the tax judgment, for the reason that the same was void and that the court had no jurisdiction to enter the same. This motion was supported by the affidavit of the deputy prosecuting attorney of the county, setting forth that the judgment was entered in the wrong case by mistake, the particulars of which it is not necessary to mention here. After service the respondent the Traders Trust Company appeared specially and resisted the motion

¹Reported in 101 Pac. 874.

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Opinion Per DUNBAR, J.

to vacate, and upon hearing, the motion was denied by the court. Notice of appeal was given from this order, but the appeal was never prosecuted further. On the 2d day of October, 1907, the respondent again moved to vacate the judgment, for the same reasons which had been urged in support of the first motion; and upon the hearing of that motion on the 26th day of December, 1907, the motion was granted, and an appeal was prosecuted to this court. The cause was reversed, for the reason that it was not competent for the respondent in that case to abandon the appeal which had been taken from the first order of the court in refusing to vacate the judgment, and then bring another action by way of a motion to vacate, based upon the same grounds upon which the former action was based. After the determination of that case in this court, the respondent in that case (the appellant in this) brought this action in equity to vacate the same judgment. A more specific statement of the circumstances surrounding the case will be found in *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164. Upon the trial of this case, judgment was rendered by the court in favor of the respondents, dismissing the action, and from this judgment, this appeal is prosecuted.

It is the contention of the respondents, and we think it is fully sustained by the law, that the former case of *Pierce County v. Bunch* is *res adjudicata* of the present action. In the opinion by this court in that case it was said:

"The record now presents this anomalous spectacle. Two orders have been entered in the court below, the one holding that procedure by motion is improper, and the other holding exactly the contrary. Both of these orders are final and neither has been vacated by this court or by the court in which the orders were made. When the first order was denied, three courses were left open to the respondent. He might appeal from the order denying the motion to vacate, he might move the court to vacate its own order on some statutory ground, or he might abide by the decision and pursue some other remedy. Instead of this, he ignored the first order entirely and proceeded as though it had never been

made and did not exist. If such a practice is permitted, the denial of one motion will but lead to the interposition of another, and there will be no end to litigation."

The same thing might be truthfully said of the condition of the case now, for a comparison of the complaint in this case with the motion to vacate, as found in the records of the old case, discloses that the motion was based upon exactly the same grounds that the complaint in the present case is based upon, the affidavit relied upon in the motion being to the effect that the judgment had been entered through inadvertence and mistake, setting up the specific acts of inadvertence and mistake. The same thing is the basis of the complaint in the present action, and such was the case as between the two motions which were before this court in the case just mentioned, the court saying:

"The contention that the second motion was based on different grounds from the first is not supported by the record, for, as said above, the same affidavit, setting forth the contentions of the respondent in detail, was attached to each motion and was necessarily a part thereof."

It is well established law in this state that,

"Where the statute affords a full, complete, and adequate remedy against an illegal judgment by authorizing the aggrieved party to proceed by motion to vacate and set aside, and permitting an appeal from any order entered upon such motion, one who has attacked a judgment by motion to vacate and has failed to prosecute an appeal from the denial of his motion, cannot subsequently maintain an action to cancel the judgment, since the question of the validity of the judgment is *res judicata*." *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955.

To the same effect is *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748, where it was said:

"A very earnest appeal in behalf of the petition of the appellant is made by counsel in their brief, and it is insisted that he has never had his day in court, and that a fraud has been perpetrated upon him by reason of the proceedings.

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But we are inclined to think that appellant has lost his rights in this action, if he ever had any. His petition, in which presumably was set out all the defense to the action that he had, was determined against him by the court on April 24, 1900. The ruling of the court in this respect was appealable."

Then, after quoting from *Chezum v. Claypool, supra*, it was said:

"The action here is in effect the same as it was in that case. The remedy was by an appeal from the order rendered on the 24th day of April, 1900, instead of by another motion based upon practically the same application."

We are also of the opinion that this action is barred by the statute of limitations. This is an action to set aside a judgment and, under the statute, must be brought within one year, and the excuse which the appellant offers for not bringing the action, viz., that he mistook his remedy until after the year had expired, cannot avail him under the doctrine that ignorance of law is no excuse for its violation.

We think that no error was committed, and the judgment must be sustained.

MOUNT, CROW, and PARKER, JJ., concur.

RUDKIN, C. J., concurs in the result.

[No. 8032. Department One. May 27, 1909.]

BONDS-FOSTER LUMBER COMPANY, *Respondent*, v. NORTHERN
PACIFIC RAILWAY COMPANY, *Appellant*.¹

CARRIERS—OF GOODS—BILL OF LADING—NEGOTIABILITY. Delivery by the consignor of a carrier's bill of lading passes no right to the property, where the bill acknowledged receipt of the property from the consignor, gave the name of the consignee and destination, and was stamped in large letters across its face, "not negotiable or assignable," and contained no stipulation reserving ownership in the consignor; as the same is in effect but a receipt for the lumber with a contract that it shall not be assigned.

SAME—STATUTES—CONSTRUCTION. Bal. Code, § 3601, providing that a bill of lading does not alter the rights or obligations of the carrier as defined in the negotiable instrument law, unless plainly inconsistent therewith, authorizes the parties to agree upon a bill of lading that is nonnegotiable; although Bal. Code, § 3598, declares that all bills of lading are negotiable.

ASSIGNMENTS—RIGHT OF ASSIGNEE. The assignee of a contract which expressly declares that it is not negotiable or assignable acquires only a cause of action against the assignor.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 16, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a bill of lading. Reversed.

Geo. T. Reid and *J. W. Quick*, for appellant.

Denman & Fishburne, for respondent.

GOSE, J.—This action was instituted by the respondent, as plaintiff, against the appellant, a common carrier, for the recovery of the value of a car load of lumber. The case arose out of the following facts: On November 6, 1907, one William McDonald shipped a car of lumber to Savage Bros.

¹Reported in 101 Pac. 877.

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at Tacoma, Washington, and received the following bill of lading as evidence of such shipment:

NORTHERN PACIFIC RAILWAY COMPANY.

No. Car. N. P. bx 42390.

Pac. Division,

McMillan, Wash., 11-6, 1907.

Received from
Consignee and
Destination

Wm. McDonald, in apparent good condition.
Description of Property. Weight.

Savage Bros.
Tacoma,
Wash.

25057 ft. Fir Lbr.

80000.

M. L. S. L. & E.

NOT NEGOTIABLE

Loaded to visible
capacity.

OR ASSIGNABLE.

Received \$—— to apply
in prepayment of charges on
property described hereon.

Advances \$—— for ——

..... Agent.

As described above, contents and value unknown, to be transported by the Northern Pacific Railway to station ready to be delivered to the part.. entitled to the same and it is expressly stipulated and agreed that the above property is transported on the conditions endorsed hereon, which form part of this contract, and of the consideration for carrying the same, and not otherwise.

NORTHERN PACIFIC RAILWAY,

No.

By C. L. Pitt, Agent.
per C. M.

The words "Not negotiable or assignable," were printed across the face of the bill in large black type. The lumber reached Tacoma on November 9 following, and on that date the carrier delivered it to Savage Bros., who subsequently paid McDonald the purchase price. On November 13, following, the respondent received the bill of lading, without indorsement, and the invoice properly assigned, from the Citizens State Bank of Puyallup, and on the 15th day of November paid said bank therefor the sum of \$243.10. Thereafter and for a period of two months or more, the respondent sought to collect the value of the lumber from Savage Bros. Its efforts in this behalf proving unsuccessful, it demanded payment from the appellant on September 2, 1908. This demand proving unavailing, it instituted this action, which terminated in a judgment in its favor. From such judgment, this appeal has been taken.

Numerous questions are argued in the respective briefs, but the view we take of the question brings it within a reasonably narrow compass. The applicable provisions of our code are as follows:

"A bill of lading or warehouse receipt is an instrument in writing signed by a carrier, warehouse proprietor, or his agent, describing the freight so as to identify it, stating the name of the consignor or owner, the terms of the contract for carriage or storage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place." Bal. Code, § 3590 (P. C. § 6780).

"All bills of lading, and transportation receipts of every kind, are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made either in blank or to the order of another." Bal. Code, § 3598 (P. C. § 8920).

"When a bill of lading or warehouse receipt is made to 'bearer' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an indorsement." Bal. Code, § 3600 (P. C. § 6781).

"A bill of lading or warehouse receipt does not alter the rights or obligations of the carrier or warehouse proprietor as defined in this chapter, unless it is plainly inconsistent therewith." Bal. Code, § 3601 (P. C. § 6782).

At common law a delivery of goods to the carrier billed to a named consignee vested the title in such consignee. *Osborne & Co. v. Van Atten*, 3 Wash. T. 53, 13 Pac. 242; *Whitman Agricultural Co. v. Strand*, 8 Wash. 647, 36 Pac. 682. In such case, aside from the statute, unless the consignors stipulated otherwise in the bill of lading, or the carrier has notice to control the effect of the document, it is exonerated from liability by a delivery to the consignee. *Lawrence v. Minturn*, 58 U. S. 100, 15 L. Ed. 58; *The Sally Magee*, 3 Wall. 451, 18 L. Ed. 197; *Southern Express Co. v. Dickson*, 94 U. S. 549, 24 L. Ed. 285; *Nebraska Meal Mills v. St. Louis etc. R. Co.*, 64 Ark. 169, 62 Am. St. 183, 38 L. R. A.

358; *Orange County Fruit Exchange v. Hubbell*, 10 N. M. 47, 61 Pac. 121; *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. 672; *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311, 24 Pac. 284; *Southern Express Co. v. Williams*, 99 Ga. 482, 27 S. E. 743; *Weisman v. Philadelphia etc. R. Co.*, 22 R. I. 128, 47 Atl. 318; *Nashville etc. R. Co. v. Grayson County Nat. Bank*, 100 Tex. 17, 93 S. W. 431; 1 Hutchinson, Carriers (3d ed.), par. 181; 6 Cyc. 468.

It is true that the books speak of the bill of lading as a symbol of the property, and statements are found to the effect that a delivery of the bill of lading is a symbolic delivery of the property, and a transfer of such property to the holder of such bill of lading. We apprehend that the true meaning of this language is that such delivery by the consignor only operates as a transfer of property or some interest in it when there is a stipulation in the bill itself whereby an ownership is retained in the consignor. It would certainly involve an absurdity to say that, where the goods are consigned to a named consignee, title passes to such consignee, and at the same time to announce that an indorsement or delivery of such bill to a third party by the consignor passes an interest in the property. It is only a symbol of the property where the consignor upon the face of the bill reserves an interest.

The first point urged by the appellant is that no title passed to the respondent, for the reason that the bill of lading was not indorsed. At common law the bill of lading was regarded as a symbol of the property, and the interest of the consignor in the property passed either by an indorsement or a delivery of the bill of lading. *City Bank v. Rome etc. R. Co.*, 44 N. Y. 136; *First Nat. Bank of Green Bay v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92; *Barnum Grain Co. v. Great Northern R. Co.*, 102 Minn. 147, 112 N. W. 1030, 1049. It has been held that the statute does not change this rule. *Scharff v. Meyer, supra*. We think that

this view would be sound where the bill of lading was in its terms in conformity with the statute, but the conclusion we have reached as to the effect of this particular bill of lading renders it unnecessary for us to determine this question.

The respondent contends that *First Nat. Bank v. Northern Pac. R. Co.*, 28 Wash. 439, 68 Pac. 965, is controlling in its behalf. In that case a quantity of wheat was billed to a named consignee without any reservation or stipulation in favor of the consignor, and the bill of lading contained no words of negotiability. An examination of this case discloses that the consignor upon the shipment sold and indorsed the bill of lading to the plaintiff for the actual consideration of the purchase price of the wheat; that the carrier, without actual notice of the interest of the plaintiff, delivered the wheat to the consignee, who refused to pay therefor; that the plaintiffs demanded the delivery of the wheat from the carrier, which delivery it refused. Upon these facts we held that the refusal of the carrier to deliver the wheat to the holder of the bill of lading was conversion, and affirmed a judgment against it for the value of the wheat. The appellant urges with great earnestness that this case does not correctly construe the statute. In view of the fact that it announces a rule upon which the title to property and the security of large business transactions depend, we will adhere to the rule of construction which it announces.

This conclusion, however, does not require an affirmance of the judgment. We have seen that § 3601 of our code provides, that

“A bill of lading or warehouse receipt does not alter the rights or obligations of the carrier or warehouse proprietor as defined in this chapter, unless it is plainly inconsistent therewith.” Bal. Code, § 3601 (P. C. § 6782).

The bill of lading in the instant case does not conform to the requirements of the statute as to the elements of a negotiable bill of lading. It is, in effect, a receipt for the lum-

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ber, and a contract between the shipper and the carrier that it shall be neither negotiated nor assigned. If any effect is to be given to the language of the section of the statute last quoted, it must be construed as permitting the parties to the contract of shipment to engage, as they did in this case, that the goods shall be shipped and delivered to the consignee and none other. This view harmonizes with a sound construction of the statute as an entirety. Aside from the section last quoted, there is a strong inference from the language used in the preceding sections that the parties to the contract may agree upon a bill of lading that is not negotiable, within the meaning of the statute. The statute announces a rule of public policy under which the shipper may demand a negotiable bill of lading, or he may likewise accept one that is not negotiable. One who accepts an assignment of a contract, which by express terms is made non-assignable, acquires only a cause of action against the assignor. *Behrens v. Cloudy*, 50 Wash. 400, 97 Pac. 450; *Burck v. Taylor*, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578; *Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859; *Zetterlund v. Texas Land & Cattle Co.*, 55 Neb. 355, 75 N. W. 860; *Andrew v. Meyerdirck*, 87 Md. 511, 40 Atl. 173.

The respondent further urges that we should adopt the view announced in *Barnum Grain Co. v. Great Northern R. Co.*, *supra*. This case arose in the state of Minnesota, which had a statute similar to Bal. Code, § 3598 (P. C. § 8920), except it provides "that all warehouse receipts or bills of lading which shall have the words 'nonnegotiable' plainly written or stamped on the face thereof shall be exempt from the provisions of this act." The court held that the only effect of these words was to exempt such bills from the operation of the statute; that they were assignable as at common law by delivery, and that the delivery of the bill of lading transferred the goods which it represented. This view is not in harmony with the cases which we have cited, and is in con-

flict with the rule announced in *Nashville etc. R. Co. v. Grayson County Nat. Bank*, *supra*, which is, in our opinion, a correct view of the common law. The respondent also cites the following cases, and urges that they support the judgment: *Dows v. National Exchange Bank of Milwaukee*, 91 U. S. 118, 23 L. Ed. 214; *The Telegraph v. Gordon*, 81 U. S. 258, 20 L. Ed. 807; *Merchants Bank v. Union R. & Transp. Co.*, 69 N. Y. 373; *First Nat. Bank of Green Bay v. Dearborn*, *supra*; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163; *City Bank v. Rome etc. R. Co.*, *supra*; *Bank of Rochester v. Jones*, 4 N. Y. 497.

In the *Dows*, *Merchants Bank*, *Bank of Cairo*, and *City Bank* cases, the bills of lading were drawn to the order of the consignor. In the *First Nat. Bank of Green Bay* case, the consignor drew upon the consignee and delivered the bill of lading as security for the amount advanced upon the draft. The goods were consigned to the drawee, who refused to receive them or pay the draft. In an action by the holder of the bill of lading against the sheriff holding under a writ of attachment against the consignor, the former was permitted to recover. In the *Bank of Rochester* case, the consignor, the owner of the flour, consigned it to his factor, who had no interest in the goods. It was held that the delivery of the bill of lading to a bank advancing money upon it gave the latter a special property in the case. The factor having received and sold the flour, it was held that the bank could maintain trover against it. The facts in these several cases clearly distinguish them from the one at bar.

The views herein expressed necessitate a reversal of the judgment and a dismissal of the action, and it is so ordered. The appellant will recover its costs.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ.,
concur.

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Statement of Case.

[No. 7917. Department One. May 27, 1909.]

J. B. WALSH *et al.*, *Appellants*, v. W. E. COLVIN *et al.*,
Respondents.¹

VENDOR AND PURCHASER—RESCISSION BY VENDEE—CONTRACT—FAILURE TO PERFORM—EVIDENCE—FAILURE OF PROOF. In an action for damages on a vendee's rescission of a land contract, on failure of the owners to deliver a deed upon demand upon one defendant, there is a failure of proof as to default by another defendant having an interest in the land who tendered a deed within a reasonable time thereafter, where it appears that he had no previous knowledge of the sale, and his only connection with the matter was through an agency expressly limited to the execution of a contract without power to make deeds until certain conditions were performed.

TENDER—SUFFICIENCY. The sufficiency or formality of a tender cannot be questioned by one who refuses unconditionally to accept a tender.

VENDOR AND PURCHASER—PERFORMANCE—REASONABLE TIME FOR DELIVERY OF DEED. Where a tender of a balance due upon the purchase price of land was made April 1, entitling the purchaser to a deed, and the vendor was without title and had to acquire the same by paying \$3,500, but took no steps to do so until the matter was taken up by another, a tender of a deed on April 29th is not made within a reasonable time.

SAME—RESCISSION BY VENDEE—DAMAGES. Where a vendor, having no title, agreed to give a deed upon payment of the balance due, which is duly tendered, the vendor does not have a reasonable time within which to acquire title, but his contract is breached, and the vendor may rescind at once and recover the purchase money paid, with interest.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 10, 1908, in favor of the defendants, by direction of the court, after a trial on the merits before the court and a jury, in an action on contract. Affirmed in part and reversed in part.

Loveday, Kelley & McMillan (L. L. Merritt, of counsel),
for appellants.

C. L. Parker and E. P. Dole, for respondents.

¹Reported in 101 Pac. 1085.

RUDKIN, C. J.—On the 19th day of March, 1908, the plaintiffs and the defendant Colvin entered into a contract in writing, whereby Colvin agreed to convey to the plaintiffs certain lands therein described, in consideration of the sum of \$950, to be paid as follows: \$100 cash on execution of the contract, the receipt of which was acknowledged, the balance in monthly installments of \$15 per month, with interest on deferred payments at the rate of 7 per cent per annum. The contract provided that a discount of ten per cent would be allowed if payment in full was made before April 1, 1908. It was further agreed that if the plaintiffs should pay said several sums promptly when due, the defendant Colvin would, upon request, deliver a deed and abstract for the premises. At the time this contract was entered into, the title to the property stood in the name of Levi Foust, of Philadelphia. The defendant Parker had a contract with Foust for the purchase of this and other lands, under the terms of which a deed to Parker was placed in escrow in a Philadelphia bank to be delivered on the payment of the sum of \$3,500, at any time within five years. On the 2d day of November, 1907, the defendants Parker and Colvin entered into an agreement with one Simpson, a real estate dealer of the city of Tacoma, which recited that Parker and Colvin had control of a large tract of land in Pierce county, including the five-acre tract in controversy, and appointed Simpson their agent to subdivide and sell the property. The latter agreement expressly provided,

“That no person entering into any contract to purchase any of said five-acre tracts shall be entitled to receive any deed until after enough land shall be sold to produce the sum of at least three thousand five hundred dollars (\$3,500) in cash payments to be paid to the said C. L. Parker or his order, and thereafter the parties of the first part are to cause deeds for said five-acre tracts to be delivered to the parties entitled thereto within a reasonable time after the full purchase price shall have been paid to the parties of the first part for any particular five-acre tract.”

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At the time the contract between the plaintiffs and the defendants Colvin was entered into, the plaintiffs were informed that the title to the property was good, and that the deed was in the bank. They had no notice or knowledge of the above contract between Parker and Colvin and Simpson, or of the true state of the title. In fact they had no notice or knowledge of the true state of the title to the land until the 18th day of April, 1908. Up to this point there was no conflict in the testimony. The plaintiffs entered into possession of the property and made improvements of some considerable value. According to their contention they tendered the balance due on the contract of purchase to Colvin on the 1st day of April, 1908, and demanded a deed. The defendant Colvin said that he was unable to give a deed at the time, and put the plaintiffs off from time to time until the 23d day of April, 1908, at which time the plaintiffs rescinded the contract, and thereafter brought this action to recover the \$100 paid on the contract and damages, amounting in all to the sum of \$1,500.

The defendant Colvin denied that the plaintiffs made a tender of the balance due on the contract, claiming that they merely expressed a readiness to pay the balance due, and receive a deed whenever he was ready to close the deal. The defendant Parker, on the other hand, had no knowledge that the contract had been entered into until the 18th day of April, 1908, and contended that a couple of days later he had an agreement or understanding with one of the attorneys for the plaintiff, under which the time for delivering the deed was extended for ten days or two weeks, and that within that time a deed was tendered. At the close of the defendants' testimony and while the plaintiffs were offering their rebuttal, the court said:

"I do not think the court would be treating you fairly without stating that it is the opinion of this court that the defendants in this action had a reasonable time after the offer of the money, in which to get their deed."

After further discussion, the court again said:

"The court will hold, in order to put an end to this case where it thinks it should end, that the testimony is not competent, for the reason that it appears conclusively in the evidence that within a reasonable time after the plaintiff tendered his money, assuming that he made a tender, that the defendants tendered a deed to him, and therefore having voluntarily abandoned the land after that time, he has suffered no damages for which he can recover from the defendants, and I will instruct a verdict for the defendants."

From a judgment entered on the verdict thus instructed, this appeal is prosecuted.

As to the respondent Parker, the judgment was clearly right. He was not a party to the contract between the appellants and Colvin, nor was he bound by the provisions of that contract. With the apparent object of showing a community of interest between Colvin and Parker, the appellants offered in evidence the recital in the contract between Parker and Colvin and their agent Simpson, to the effect that Parker and Colvin had control of a certain tract of land in Pierce county, which included the land in controversy, but the relation between the parties must be determined from the entire contract, and the court below properly so ruled. As shown above, that contract provided that no purchaser should be entitled to a deed until at least \$3,500 had been received from the sale of the lands described therein, and that a deed should be delivered within a reasonable time thereafter. If we should assume that this contract created an agency of some kind between Parker and Colvin, the agency was a limited one, and would not authorize the execution of any such contract as that before the court. No other or further attempt was made to connect the respondent Parker with the contract, and as to him there was a failure of proof.

Again, there is some controversy as to whether the appellants made a sufficient tender of the balance due on the purchase price on April 1, and whether the respondents made a sufficient tender of a deed on April 29. The respondents

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contend that the ten per cent discount was to be allowed on the balance of \$850 due on the purchase price, while the appellants contend, and attempted to show by proof, that the discount of ten per cent was to be allowed on the entire purchase price. This would make a difference of \$10 between the parties as to the amount of the balance due. The testimony of the appellants tends to show, however, that they tendered the sum of \$800, out of which they asked the respondent Colvin to take the balance due, which under no circumstances could exceed \$775, and that Colvin stated that he could not give a deed, and refused to accept the tender. Under the repeated rulings of this court the tender was sufficient under such circumstances. It also appears, without apparent contradiction, that the respondents were ready, able, and willing to give a good and sufficient deed to the premises on April 29, and expressed their willingness so to do, but their offer was rejected absolutely and unconditionally by the appellants. Here again a more formal tender was waived.

The respondent Colvin attempts to sustain the judgment in his favor upon the ground that the time for delivering the deed was extended by agreement of the parties, but we do not think the judgment should be sustained on that ground. Manifestly if no tender of the purchase price was made, or if the time for performance was extended by agreement, the appellants must fail in their action, but the court below based its decision on the broad ground that a tender of a deed on April 29, in performance of a contract calling for a delivery on April 1, was within a reasonable time as a matter of law. The appellants were given no opportunity to controvert the testimony tending to show an extension of time by agreement, and under the ruling of the trial court, such testimony would have been immaterial. The judgment must therefore stand upon the ground upon which it was based in the court below, if it stands at all. No doubt a vendor has a reasonable time in which to prepare and tender a deed after a tender of the purchase price, and it is equally well settled that what consti-

tutes a reasonable time may be a question of law for the court. The time may be short or so long delayed that a court will not hesitate to declare the time reasonable or unreasonable as a matter of law, but between these extremes there is a debatable ground where the reasonableness of the time is a mixed question of law and fact to be determined by the jury under proper instructions from the court.

In the case at bar, if the testimony of the appellants is true, and it was the exclusive province of the jury to determine that question, we do not think that the deed was tendered within a reasonable time, either as a matter of law, or as a matter of fact. If we assume that the appellants tendered the balance due on the purchase price on April 1, and demanded a deed, and we must so assume, the respondent Colvin did not attempt to show that April 29th was a reasonable time within which to tender a deed under the circumstances of this case. Indeed, his defense was that there was no tender or demand for a deed at all. At that time the property stood in the name of a third person, and Colvin and Parker could only obtain a deed by paying the sum of \$3,500. Colvin did not offer or attempt to pay this sum, nor did he consult with his vendors about obtaining the title, or take any other steps to place himself in a position to perform his contract, so far as the testimony discloses, until the matter was taken up by the appellants' counsel with the respondent Parker. While a vendor may have a reasonable time in which to prepare and deliver a deed, he does not have a reasonable time in which to acquire title to the property to enable him to perform his contract. If a vendor agrees to convey title at a given time, and has no title when the date for performance arrives, the question of a reasonable time for preparing a deed does not enter into the case. There is a breach of the agreement to convey for which the purchaser may at once rescind. *Goetz v. Walters*, 34 Minn. 241, 25 N. W. 404; *Gregory v. Christian*, 42 Minn. 304, 44 N. W. 202, 18 Am. St. 507; *Primm v. Wise*, 126 Iowa 528, 102 N. W. 427; *Webb v.*

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Hancher, 127 Iowa 269, 102 N. W. 1127; *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. 213.

As to the respondent Colvin, the judgment must therefore be reversed. If it should appear on a retrial that no tender of the purchase price was made or that the appellants acquiesced in or assented to the delay, of course they cannot recover, but if a proper tender and demand was made and respondent Colvin refused to perform and was unable to give title, the appellants will be entitled to recover what they paid on the contract, with interest. The measure of damages in other respects is discussed to some extent in the briefs, but this question was not passed upon by the court below, except in a very general way in ruling upon the admissibility of testimony, and there is no definite ruling before us to review.

The judgment is affirmed as to the respondent Parker, and reversed as to the respondent Colvin, with directions to award a new trial as to the latter. Parker will recover his costs against the appellants, and the appellants will recover their costs against the respondent Colvin.

CHADWICK, FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 7796. Decided May 27, 1909.]

MINNIE HORTON, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—CLAIMS—DESCRIPTION OF DEFECT—SUFFICIENCY. A claim for damages sufficiently locates and describes the defect, where it describes a hole in a certain street "lying in front of the new ferry slip," and that plaintiff fell into a hole as she went from the ferry slip to said street; since the hole previously described is evidently intended.

SAME—CLAIM BY MARRIED WOMAN—HUSBAND AND WIFE. A claim against a city for personal injuries to a married woman need not be signed by the husband.

HUSBAND AND WIFE—PERSONAL INJURIES TO WIFE—RIGHT OF ACTION. A married woman living separate and apart from her husband may maintain an action in her own name for personal injuries sustained by her, under Bal. Code, § 4826, subd. 3.

MUNICIPAL CORPORATIONS—CLAIMS—DESCRIPTION OF INJURY. Where a claim against a city for personal injuries makes no mention of injury to her eyesight, although alleged in the complaint, plaintiff cannot recover therefor, when the claim was filed 21 days after the injury and she testifies that she knew her eyesight was injured within five days after the accident.

SAME—DAMAGES—PLEADING—ISSUES—SURPRISE AND DENIAL OF CONTINUANCE. Where the personal injuries alleged are the dislocation of a hip joint, paralysis of the right leg, bruises over the lower portion of the abdomen and severe shock to the nervous system, it is error to admit evidence of excessive menstruation, and to deny a continuance upon objection by the defense and claim of surprise.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—EVIDENCE—ORDINANCES—ADMISSIBILITY. In an action against a city for personal injuries sustained in a fall through a hole in the street, it is proper to admit portions of city ordinances showing that the place was a public street; but it is error to allow portions thereof to be read showing that railroad companies had agreed to keep the same in repair and were liable over to the city, where the companies were not parties to the action.

RUDKIN, C. J., DUNBAR, PARKER, and GOSE, JJ., dissent.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 16, 1908, upon the verdict

¹Reported in 101 Pac. 1091.

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of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

Scott Calhoun and James E. Bradford, for appellant.

Blaine, Tucker & Hyland and Robert C. Saunders, for respondent.

MOUNT, J.—Respondent brought this action to recover for personal injuries alleged to have occurred by reason of falling into a hole in a public street in West Seattle. The cause was tried to a court and jury, and resulted in a verdict in favor of the plaintiff for \$2,500. The defendant appeals from a judgment entered on the verdict.

Many errors are assigned which are not necessary to be mentioned specifically. We shall notice those only which appellant seems to rely upon, and which may arise upon a new trial. Appellant contends that the claim for damages, which was filed with the city under § 29 of art. 4 of the city charter, is insufficient, because (1) the claim does not accurately locate and describe the defect which caused the injury, and (2) because the evidence shows that the respondent was a married woman, and the claim was verified and filed by her without her husband joining therein. The claim filed with the city recites that:

“On the evening of the 11th day of November, 1907, at the hour of about 6:30 or 7:15 o'clock, the night being very dark, and that portion of Railroad avenue lying in front of the new ferry slip was unlighted, and the trestle work in said street at said point was open excepting for the ties of the Northern Pacific Railway Company and the Seattle Electric Company, and between its ties an opening was left and no railings surrounded the said open place, and the same could not be seen by any person, and the street had been in that condition and had remained for more than six months, and the same was known to the officials of the city,” etc.;

that petitioner went from the new ferry slip “to the street known as Railroad avenue in West Seattle, and without fault on her part fell into an opening and fell a distance of ten

or twelve feet to the tide flats below." This claim locates the defect on Railroad avenue in front of the new ferry slip. It describes the hole there in the street. This was clearly sufficient, under the rule as stated in *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893, and *Mulligan v. Seattle*, 42 Wash. 264, 84 Pac. 721, where we held, in substance, that a reasonable compliance with the charter and a description sufficient to identify the place and enable one to find it is all that is required. It is true the respondent does not say definitely that she fell into the hole described, but she does say that she went from the new ferry slip to the street known as Railroad avenue, and fell into an opening. It is clear that she meant the same opening she had described above. The claim was therefore sufficient. Her evidence is definite upon that point.

It is next alleged that the claim is invalid because the respondent was a married woman and the claim was not signed by her husband. We held, in *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784, that a claim of this kind, filed by a married woman in her own name, was sufficient. The evidence in this case shows that the respondent is, and has been, living separate and apart from her husband. Under these conditions she was authorized, by subdivision 3 of Bal. Code. § 4826 (P. C. § 254), to maintain the action alone.

Appellant next urges that the court erred in excluding certain cross-examination of respondent's witnesses. A reading of the evidence convinces us that the court did not abuse its discretion in these matters. We deem it unnecessary to set out the facts or discuss these points more particularly.

The respondent was permitted to testify, in substance, over appellant's objections, that her eyesight was affected by the injury she received, and also that, after she recovered from the external effects of her injuries, she suffered, and still suffers, from excessive menstruation. She testified on cross-examination that she knew of the injury to her eyesight within five days after the accident. The appellant contends

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that the court erred in submitting these elements of damages to the jury. This contention must be sustained. The claim filed with the city described the injuries of the respondent as follows:

"She was greatly bruised and injured and her whole right side was paralyzed and she suffered great pain under her kidney and right hip joint and she also suffered severe pains in her right leg."

The injuries as alleged in the complaint were described as follows:

"Plaintiff's right hip joint was dislocated, her right leg paralyzed; she was greatly bruised over the lower portion of her abdomen on the right side, and she received a severe shock to her nervous system, through which her eyesight has been impaired. She became unconscious from said fall, and remained so for a long space of time, and was obliged to take to her bed as aforesaid for a period of practically three weeks, during all of which time plaintiff suffered great mental pain and bodily anguish, and thereafter plaintiff was obliged to use crutches for a long space of time; that plaintiff's physical health has been greatly impaired, and she can do no heavy work whatever; that on account of such injury, plaintiff's right shoulder has become lower, and her whole body has become disfigured."

It will be noticed that the complaint in the paragraph above quoted alleges an impairment of the eyesight, but the claim filed with the city, upon which the action was based, makes no mention of this injury. The respondent testified that she knew, within five days after the accident, that her eyesight was injured. The claim was not filed with the city until twenty-one days after the accident. It is clear, therefore, that the respondent knew of this injury to her eyes some two weeks before she filed her claim, and she did not base any damage thereon. In *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383, in speaking to the question presented here, we said, at page 621:

"It is manifestly just, and seems to be the rule of the cases, that all of the known effects of the injury, upon which

the claimant intends to rely for recovery, should be stated in the claim, where the statute or charter requires the nature and extent of the injuries received to be stated. This does not mean, however, that the claim will be construed with technical strictness, or that a general statement of the injuries received will preclude proofs at the trial of the natural and proximate results of the injuries described."

It is certainly not an unreasonable requirement that a known injury of this character shall be stated in the claim, and, if not so stated, no recovery can be based thereon. The trial court, therefore, erred in submitting this element of damage to the jury.

Neither the claim filed nor the complaint alleged excessive menstruation as an element of damages, but the court, over the objection of the appellant, permitted evidence to go to the jury upon that point. If we concede that excessive menstruation may be a natural and proximate result of the general injuries alleged, and if we concede further that the complaint might have been amended at the trial so as to embrace that element, yet where the defense was taken by surprise when evidence to that effect was offered in the absence of any allegation of the kind in the complaint, and when a continuance is asked in order to meet such new issue, as was the case here, we think the court should either have rejected the evidence or continued the case for a reasonable time at the request of the appellant, in order that it might be prepared to meet the new issue.

Certain city ordinances granting railroad franchises were introduced in evidence, and parts thereof were read, over the objection of appellant. These ordinances were offered ostensibly for the purpose of showing that the hole into which respondent fell was in a public street. Parts thereof were properly admitted for that purpose. But certain sections were to the effect that the railroad companies were required by the ordinances to keep the streets in repair, and that such railroads were liable to the city for injuries on account of defects in the street made by such railway companies. The

fact that the railroad companies were liable was clearly immaterial to this case. The city was the only party defendant. The railroad companies were not parties to the action. The admission of sections referred to was clearly erroneous. *Westby v. Washington Brick etc. Mfg. Co.*, 40 Wash. 289, 82 Pac. 271.

We find no error in the other assignments, but on account of the errors above discussed, the judgment must be reversed and a new trial ordered.

CROW, CHADWICK, FULLERTON, and MORRIS, JJ., concur.

RUDDIN, C. J., DUNBAR, PARKER, and GOSE, JJ., dissent.

[No. 7846. Department One. May 27, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Cascade
Public Service Corporation, Plaintiff*, v. THE SUPERIOR
COURT FOR PIERCE COUNTY, *et al.*, *Respondents*.¹

EMINENT DOMAIN—CERTIORARI—REVIEW—PARTIES ENTITLED. Upon certiorari to review a judgment in a proceeding by one public service corporation to condemn the lands of another, as having a prior right thereto, objections filed by leave of the supreme court, by a municipal corporation claiming rights in the property and that neither party is a public service corporation, will not be considered by the supreme court.

EMINENT DOMAIN—PROCEEDINGS—PRIORITY OF RIGHT. As between two public service corporations seeking condemnation of the same lands, the one prior in time is prior in right.

Certiorari to review a judgment of the superior court for Pierce county, Chapman, J., entered December 9, 1908, after a trial before the court without a jury, on the merits, dismissing a condemnation proceeding. Affirmed.

¹Reported in 101 Pac. 1094.

Ellis, Fletcher & Evans and *George M. Sinclair*, for plaintiff.

T. L. Stiles, F. R. Baker, and *F. A. Latcham*, for appellant City of Tacoma.

Hayden & Langhorne, for respondent Nisqually Power Co.

MORRIS, J.—This is a contest between two corporations, claiming to be public service corporations, each asserting its priority of right to utilize the waters of the Nisqually river to develop water power for the manufacture of electricity. The plaintiff filed its petition October 15, 1907, in which it sought to condemn lands belonging to the respondent company, situate in the counties of Pierce and Thurston, for the purpose of a storage basin. The respondent company appeared and numerous hearings were had, until December 8, 1908, when the court below handed down its decision in favor of the respondent company, upon the theory that it, being first in time, was first in right; and on December 9, 1908, entered its order dismissing the petition, and the plaintiff brings the proceedings to this court for review.

The city of Tacoma, having first obtained leave so to do, files its brief in this court, in which it sets forth that it is proceeding under various public utility acts to acquire property necessary to the construction of an electric generating plant, to furnish electric power for its lighting purposes, and to that end has selected as the most available location the lands of both plaintiff and respondent company, as well as other lands along the Nisqually river, and a part of the waters of the river. The city then attempts to show in its brief that neither the plaintiff nor the respondent company is a public service corporation, and hence neither is entitled to exercise the right of eminent domain. We do not pass upon such question so raised by the city, as it is not directly involved in the question submitted under the writ herein. It will be ample and better time to determine that question when either of these contending corporations seeks to exercise the right

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of eminent domain against third persons, or the city seeks in direct proceedings to acquire the lands of either. Doubtless their rights in that regard will then be questioned, and can then best be determined.

As between the plaintiff and respondent company, we adopt the finding of the lower court that the respondent company was first in time and, so finding, we hold it to be first in right. "When different corporations desire the same location, the one that is prior in point of time is also prior in point of right." Mills, *Eminent Domain* (2d ed.), § 4. Such has become the announced rule of this court. *State ex rel. Kettle Falls etc. Irr. Co. v. Superior Court*, 46 Wash. 500, 90 Pac. 650; *Nicomén Boom Co. v. North Shore Boom etc. Co.*, 40 Wash. 315, 82 Pac. 412.

The judgment is therefore affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and CHADWICK, JJ.,
concur.

[No. 7881. Department One. May 27, 1909.]

BAY VIEW LAND COMPANY, *Respondent*, v. A. S. FERGUSON,
Appellant.¹

FRAUDS, STATUTE OF—INTEREST IN LANDS—LICENSES. When an oral contract for the sale of standing timber to be cut immediately is executed, it cannot be attacked as affecting an interest in lands, within the statute of frauds; since, if not valid as a sale of personal property, it is valid as a license to enter and sever the timber.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered April 24, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

J. B. Keener and M. Mulligan, for appellant.

W. McB. Perrin and Frank A. Magill, for respondent.

¹Reported in 101 Pac. 1093.

MORRIS, J.—On October 13, 1906, the parties hereto entered into an oral contract for the sale of the marketable logs, piling, and poles on certain lands situate in King county, the consideration being \$2,500, and the delivery of certain piling, the timber to be removed on or before April 15, 1907. The contract was to be reduced to writing, and, in accordance with this understanding, the respondent prepared and executed a contract, containing all the provisions agreed upon, and submitted the same to appellant for his signature. Appellant, while making no objection to the form of the contract as prepared and submitted, for various reasons not material here, delayed executing the written contract from time to time, and never did sign it, although it does not appear that he ever refused to execute it, or objected to any of its terms. Appellant went into possession of the land, and commenced cutting and removing the timber as agreed upon in the oral contract, and so continued until all the marketable timber had been cut and removed. The appellant was a stockholder in the respondent company, and as security for the performance of the contract, he was to assign and deliver his stock to the respondent. All the payments provided for in the contract not having been made, nor the piling delivered, respondent brought this action, in which, in addition to what it claimed to be due upon the sale of the timber, and the failure to deliver the piling, it sought to obtain a decree directing an assignment to it of all appellant's interest in the company. Issues being framed, trial was had, resulting in a decree for the company as prayed for, and defendant appeals.

The principal error assigned is that the contract was oral, and being for the sale of standing timber, it was an interest in land, and therefore void. Upon this subject there is a very decided conflict of authority; a large number of cases holding that such a contract conveys an interest in the land, and hence must be in writing, while others hold that, where the timber is to be cut and immediately, or within a reason-

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able time, removed, the sale is of personal property, and not of an interest in the land. Other cases adopt the rule that growing trees may be the subject of an ownership distinct from the ownership of the soil, and that a license to enter upon the land and cut and remove them may be valid, and that if such license be not revoked before the trees are severed, the property in them passes. So that, irrespective of either theory of such contracts as being within or without the statute of frauds, they may, even though oral, operate as a license to enter, cut, and remove the trees, and when executed are not subject to attack upon any theory of affecting an interest in lands, and we so hold. *Warvelle, Vendors*, § 162; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Pratt v. Ogden*, 34 N. Y. 20; *Poor v. Oakman*, 104 Mass. 309.

Other errors are assigned which we have considered but do not discuss, other than to say they are not material in view of the conclusion reached.

The findings of fact made by the court below were proper and justified by the evidence, and the conclusions of law and judgment based thereon correct. The judgment is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ.,
concur.

[No. 7816. Department One. May 28, 1909.]

WESTERN UNION TELEGRAPH COMPANY, *Respondent*, v.

E. M. LAKIN, *Treasurer of Pierce County, Appellant*.¹

TAXATION—FEDERAL FRANCHISES—TELEGRAPH COMPANIES. The Federal franchise granted to telegraph companies by U. S. Rev. Statutes, § 5263, to maintain lines on and over the military or post roads of the United States, is not subject to an arbitrary franchise tax by the state.

SAME—TELEGRAPH COMPANIES—EXCLUSIVENESS OF FEDERAL FRANCHISE. The Federal franchise granted to telegraph companies by U. S. Rev. Statutes, § 5263, to maintain its lines on and over the military or post roads of the United States, confers the right to do business upon all the roads and highways in cities and counties, subject to police regulation, and is exclusive; hence a municipal franchise is valid only as a police regulation and is not subject to an arbitrary franchise tax.

SAME—VOID ASSESSMENT—OBJECTIONS—WAIVER. Failure of a telegraph company to list all its tangible property for taxation does not preclude it from resisting a tax on its Federal franchise.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 18, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

H. G. Rowland, Robert M. Davis, and J. L. McMurray, for appellant.

Harold Preston (Beverly L. Hodghead and George H. Fearons, of counsel), for respondent.

CHADWICK, J.—This action was brought by the Western Union Telegraph Company, a corporation organized under the laws of the state of New York and doing business as a common carrier of telegraphic messages in this and other states in the Union, to restrain the county of Pierce from collecting a tax levied upon its franchise in Pierce county.

¹Reported in 101 Pac. 1094.

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The record shows that the poles, wires, office fixtures, and other tangible property belonging to the company were listed for taxation, and that the assessor, of his own initiative, had listed the franchise of the company for taxation in the sum of \$15,000. It also appears that the company was operating and maintaining its lines upon the public roads and highways in Pierce county, also upon the streets and alleys of the cities of Tacoma, Puyallup, Orting, Ruston, Steilacoom, Sumner, and Buckley; that it had certain valuable contracts with the Associated Press, a right of way over the right of way of the Northern Pacific Railway Company, and a gross business of over \$40,000 within the county for the year preceding the assessment. It also appears that three ordinances have been passed by the city of Tacoma granting rights to the company to operate in that city. Only one of these was admitted by the court, but the question left for our decision is not affected by this ruling. The nature of the business carried on by the company, its relation and importance to the Federal government, induced Congress to fix upon it a Federal character, and although it was organized under the laws of the state of New York, it has extended its lines and business throughout the states and territories under an act of Congress in the nature of a franchise, and which we shall refer to as the Federal franchise, passed July 24, 1866 (U. S. Rev. Stats. § 5263), which reads as follows:

"Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to interfere with the ordinary travel on such military or post-roads."

The obligations of this act of Congress were accepted by the company on June 8, 1867, and it now insists that it has the right to construct, maintain, and operate lines of telegraph over and along any of the military roads and post-roads of the United States; that the ordinance of the city of Tacoma did not, and could not, confer any greater right upon the company than it had under the Federal franchise; that it was in effect only a police regulation, conveying or creating nothing that was tangible or taxable by the county or state. The briefs and arguments, as well as the record submitted for review, fairly raise the questions, whether the Federal franchise is exclusive, whether it is subject to taxation, and whether the company is entitled to any privileges under the Federal franchise, it being organized under the laws of a sister state.

The principal case relied on by appellant is that of *Western Union Tel. Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790. The property of the company was assessed by the state of Massachusetts in the following manner: The capital stock, or such proportion thereof as the value of the plant in Massachusetts bore to the value of the plant in the United States, was listed for taxation. An estimate of all of the company's property in the state and all its property in the United States was made, but no deduction was made for the Federal franchise. This method of taxation was upheld. In that case, and in all the cases cited by appellant, it is insisted that the court held that the state had a right to tax a Federal franchise. If the cases be so construed, appellant is probably supported in his contention by the weight of authority. He cites and relies upon the following cases: *Western Union Tel. Co. v. Attorney General of Massachusetts*, *supra*; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; *Western Union Tel. Co. v. Taggart*, 163 U. S.

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1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *Western Union Tel. Co. v. Missouri ex rel. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133; *Western Union Tel. Co. v. Wright*, 158 Fed. 1004; *Henderson Bridge Co. v. Henderson*, 173 U. S. 624, 19 Sup. Ct. 877, 43 L. Ed. 835; *State ex rel. Coleman v. Western Union Tel. Co.*, 75 Kan. 609, 90 Pac. 299. On the other hand, respondent contends, not only that the courts have not held that the state can tax a Federal franchise, but that it has been held that it cannot do so. It relies upon the following cases: *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *San Francisco v. Western Union Tel. Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301; *Western Union Tel. Co. v. Texas*, 105 U. S. 554, 26 L. Ed. 1067; *Western Union Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023.

We think that, in all the cases cited by appellant, the real question was the legality and constitutionality of the method employed to fix the value of the capital stock or tangible property for the purposes of taxation, and that the question of separate assessment of the franchise, as such, was not the controlling one. In the case reported in 125 U. S. 530, the court said, in reference to the Federal statute:

“While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair pro-

portion of the taxes necessary to its support. . . . The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the state of Massachusetts, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution;”

a conclusion with which we agree. The whole argument proceeds upon the theory that the method employed was a tax upon property, rather than upon the privilege of doing business in the state of Massachusetts.

That a Federal franchise, the privilege of doing interstate business, could not be interfered with by injunction is additional proof that the court did not intend to sanction a tax upon the franchise, for had it been considered a proper subject of taxation, it was subject to all the laws of the state enacted in aid of tax enforcement. An injunction is a remedy provided by the statutes of Massachusetts for the enforcement of the tax, and upon appellant's theory should not have been denied. On this point, the court said:

“The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the state of Massachusetts. The act of Congress says that the company accepting its provisions ‘shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States.’ It is found in this case that 2334.55 miles of the company's lines, out of 2833.05 on which this tax is assessed, are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the state. If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly

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held it had, the state can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous."

The law of the state of Massachusetts was again upheld in *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40. In these cases, as we read them, it was held that an excise upon the capital of a corporation, fixed by reference to the proportion the length of its lines within a state bears to their entire length throughout the country, was not unfair and unjust, but furnished a basis for levy of a property tax, and when so fixed the company could not complain, although the value of its franchise became an element in determining such value. The other cases cited by appellant are in accord with this conclusion.

While the courts have held that a franchise granted by the Congress of the United States may be considered in fixing the value of the capital stock and tangible property for the purposes of taxation, they have never held that a mere arbitrary tax upon a Federal franchise, with no fixed basis for valuation and as a distinct item separate and disassociated from the tangible property or capital stock, is proper. The proper distinction between an arbitrary tax on a mere privilege to do business under the Federal law and a tax levied upon property, is clearly stated in *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, where a tax was graduated according to the amount and value of the property measured by miles. This was held to be a property tax, and not a tax imposed on the privilege of doing an interstate business. The court said:

"In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction

in arriving at the true intention and effect of state legislation. We are of opinion that it was within the power of the state to levy a charge upon this company in the form of a franchise tax but arrived at with reference to the value of its property within the state and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the state in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

The case reported in 163 U. S., page 1, involved a statute of the state of Indiana, based on the principle of taxation adopted by the state of Massachusetts, and is a reaffirmation of the case reported in 125 U. S. 530. After reference to that case and others, the court said:

"Those decisions clearly establish that a statute of a state, requiring a telegraph company to pay a tax upon its property within the state, valued at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other states; unless there is something more showing than the system of taxation adopted is oppressive and unconstitutional."

In 166 U. S. 185, the power of the state to tax the property of a foreign corporation doing an interstate business, at its true value, was affirmed. Mr. Justice Brewer, who rendered the opinion of the court, said:

"The burden of the contention of the express companies is that they have within the limits of the state certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the state; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them. But

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this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property. . . . A distinction must be noticed between the construction of a state law and the power of a state. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern."

The case reported in 190 U. S. 412, reaffirms the doctrine of the Massachusetts cases, holding the tax there levied to be a property tax, and not an arbitrary tax upon the franchise. It has never been so held, and enough has been said in the cases just reviewed to show that a mere tax on a Federal franchise could not be sustained. The franchise to do business on and over the highways and post-roads in the United States is not only a permission, but an advantage to the government, growing out of the necessities of administration. In it the government has an interest. Upon it it must place dependence in time of war and in time of peace. It is a creature not alone of the bounty of the government; it is born of its needs, and is essential to its maintenance. As was said by Justice Gray, in 163 U. S., on page 14:

"It is not and cannot be doubted that each state of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the National government are not interfered with."

It requires no argument to sustain the point that a mere tax on the privilege of doing business, which in one way or another might interrupt this governmental interest, cannot be sustained. It is upon this principle that the case of *California v. Central Pac. R. Co.*, *supra*, rests. Mr. Justice Bradley, speaking for the court, not only declares this rule, but also notices the rule upon which taxation of property of this character must be made to depend:

"Recollecting the fundamental principle that the constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. The Bank of the United States*, 9 Wheat. 738; and *Brown v. Maryland*, 12 Wheat. 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson v. Pacific Railroad*, 9 Wall. 579, and *Railroad Co. v. Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations. 18 Wall. 35, 37."

The exact question here presented was before the supreme court of California in the case of *Western Union Tel. Co. v. Visalia*, *supra*, where the power to tax the franchise of the company was denied, on the theory that an ordinance passed by the city purporting to confer rights on the company was not a franchise but simply a police regulation. The court said:

"If it can be construed as an attempted granting or an original franchise to operate a telegraph line through the streets of the city it would be merely an empty form of

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granting what the plaintiff already had and of which the city could not deprive it. The plaintiff had that right not only from the act of Congress above referred to but also from section 536 of our Civil Code, which provides that 'telegraph corporations may construct lines of telegraph along and upon any public road or highway.' But we do not think that the ordinance purports to grant any 'franchise.' While the appellant had the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city, nevertheless it could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel, and the city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel. And we think that the ordinance in question was not intended to be anything more, and is nothing more, than the exercise of this authority to regulate. But such regulation is not the granting of a franchise; it is a restriction of and burden upon a franchise already existing; it is not an original and affirmative granting of anything in the nature of a franchise."

The company possessed, under its Federal franchise, the right to do business upon all the roads and highways in the county of Pierce, whether within or without incorporated cities and towns. This right could not be denied. The power of the city was limited to its right to regulate the use of the privilege granted by Congress. It might provide, that poles and wires should be carried over certain streets; that the wires should be carried on poles or buried in the ground; that travel should not be unreasonably obstructed, and that poles should be of a certain height, and other like incidents. Beyond this it had no power to go. The ordinance relied upon did not grant a franchise. From all the cases, we deduce the principles, that a corporation doing an interstate business under a Federal franchise must, like the domestic concern, subject all of its property to the taxing power of the state; that a franchise tax arbitrarily levied cannot be sustained, because it may result in the interruption of the functions or conveniences of government; that the property

of such corporation may be taxed by the state upon a valuation fixed with reference to its use and earning power, and although the right to do business be called a franchise, it may be included as an element in fixing value; that courts will not then, in the absence of fraud, inquire into the methods adopted by the state in arriving at such valuation; that such methods of taxing corporations holding a Federal franchise are sanctioned by the courts upon the theory of a property tax, notwithstanding the value of the franchise is considered as an element in fixing such valuation.

The reason for these rules is apparent. The one method favored by the courts may be enforced by resort to a court of equity having power to declare a lien and provide for its payment, while an arbitrary tax of a Federal franchise could not be enforced. It could not be sold, nor its use enjoined, for the very obvious reason that the government's interest is such that no process or procedure of the state can operate to dispossess the holder of the privilege granted by the government. It follows that, in so far as Pierce county has sought to tax the franchise of the company, the attempt was ineffectual. It was a void effort to tax a Federal franchise without graduating its value according to the value of all its property within the state. Inasmuch as the ordinance of the city of Tacoma, relied on by appellant, conferred no rights other than those already possessed by the company, but was in effect a police regulation, there was no right of taxation on that account. The county of Pierce has not brought itself within any approved method for the taxation of intangible property sanctioned by the courts, and the restraining order was properly issued by the court below.

It is further insisted that, because the company did not schedule for taxation its right of way over the Northern Pacific right of way and its contract with the Associated Press, it should not be heard to question the attempt of an assessment of its franchise. This might be true were the franchise a taxable quantity. Having decided that it was

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not taxable in the manner, or, it might be said, at all under any law of the state of Washington then existing, the rule cannot be held to apply.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7832. Decided May 28, 1909.]

HOUSER & HAINES MANUFACTURING COMPANY, *Appellant*, v.
JAMES MCKAY, *Respondent*.¹

SALES—BREACH OF WARRANTY—REMEDIES OF PURCHASER—DAMAGES RECOVERABLE—ELECTION. Upon the breach of an implied warranty of a combined harvester, the purchaser may elect to rescind the sale and recover the purchase money paid, or he may retain the machine and offset against the purchase price the damages to his crops naturally resulting from the breach; but he cannot, in an action for the price, recover on counterclaim both the purchase money paid, as upon a rescission, and damages to his crops by reason of the breach of warranty, as the remedies are inconsistent (DUNBAR, CHADWICK, and FULLERTON, JJ., dissenting).

SAME—RESCISSION FOR BREACH OF WARRANTY—PLEADING—ISSUES—MEASURE OF DAMAGES. In an action for the purchase price of a combined harvester in which the defendant set up a breach of warranty and claimed damages to his crop in attempting to use the machine, and it appears from evidence admitted without objection that the defendant rescinded the sale and refused to accept the machine, defendants measure of damages is the sum paid on the purchase price; and he cannot recover for damages to his crop (DUNBAR, CHADWICK, and FULLERTON, JJ., dissenting).

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered September 19, 1908, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Reversed.

Hamblen, Lund & Gilbert (William A. Gilbert, of counsel),
for appellant.

¹Reported in 101 Pac. 894.

Merritt, Oswald & Merritt, for respondent, contended, *inter alia*, that damages to crops could be recovered on breach of the warranty, as reasonably within the contemplation of the parties. 1 *Sutherland Damages* (3d ed.), pp. 176-7; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403; *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. 88; *Borradaile v. Brunton*, 8 Taunt. 535, 4 E. C. L. 202; *Goodloe v. Rogers*, 9 La. Ann. 273, 61 Am. Dec. 205; *Mowbray v. Merryweather*, 65 L. J. Q. B. 50; *Smeed v. Foord*, 1 El. & El. 602; *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371; *Hadley v. Baxendale*, 9 Exch. 341, 26 Eng. Law & Eq. 398; *Sedgwick, Measure of Damages* (4th ed.), p. 79.

GOSZ, J.—This action was instituted for the purpose of recovering a judgment against the defendant for the sum of \$1,600 and interest, upon a contract for the sale and delivery of a combined harvester. The case was tried to a jury, and resulted in a verdict and judgment against the plaintiff for the sum of \$520. The plaintiff has appealed from this judgment.

The complaint set forth the sale and delivery of the harvester and the failure of the defendant to pay the purchase price. The defendant pleaded affirmatively that, in October, 1906, he gave the plaintiff a written order directing it to manufacture at Stockton, California, and ship to him at Wilbur, Washington, a certain described combined harvester, for which he agreed to pay it \$1,600 at fixed dates; that the defendant ordered such harvester manufactured for the purpose of harvesting his crop, as the plaintiff well knew; that the plaintiff sold the same to him for harvesting purposes; that there was an implied warranty upon the part of the plaintiff that the harvester was made of good material; that

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it was fit and proper for such purpose; that it would successfully harvest his crop; that it was not properly constructed; that it was not made of good material; that it was not fit or suitable for harvesting purposes; that after reasonable trial, it was found inadequate and useless for the purpose it was intended to accomplish, and of no value; that he gave the machine a fair trial, and as a result of its failure to do the work which it is warranted to do, and the delays incident to its trial, his grain became overripe; that he lost a large part of his crop, and the remainder was greatly impaired in value by reason of such delay. The injury and loss to his crop was alleged to be \$1,750, which he specially pleaded. He further claimed the sum of \$125, which he alleged he had paid as freight on the harvester from the factory to Wilbur. The reply joined issue on the affirmative matter pleaded in the answer. The court instructed the jury in substance that, if it found by a preponderance of the evidence that these affirmative facts pleaded in the answer were true, they should determine the amount of damage that might fairly and reasonably be considered as arising from such breach of contract, and such as it would be reasonable to conclude had been in the contemplation of both the parties at the time they made the contract, as the probable result of its breach, and return a verdict for the respondent for such sum. This instruction is assigned as error.

The appellant urges that, when the respondent became aware of the fact that the harvester was not such as the appellant had warranted it to be, he had the right to elect as to one of two courses; (1) he could refuse to accept the machine, rescind the sale, and recover any sum that he had paid on account of the purchase price; (2) that he could retain the machine and offset against the purchase price such damages as naturally and proximately resulted from the breach of the warranty. We think these propositions are well established. At any rate, we have not been able to find any diver-

sity of authority on this question. The governing rule in such cases is very aptly and tersely stated in *Osborne & Co. v. Poindexter* (Tex. Civ. App.), 34 S. W. 299. At page 301 it is said:

"The plaintiffs might have tendered back the machine, and demanded their notes and money, or, at their option, might elect to keep the machine, and pay the price, and sue for damages in the difference in value of the machine as represented and warranted, and as it really was, and for the special damages occasioned by the breach of the warranty." See, also, *Mechem, Sales*, par. 816; 30 Am. & Eng. Ency. Law (2d ed.), pp. 190-7.

"The bringing of an action on the warranty for damages implies an affirmation of the contract of sale and a *prima facie* liability for the contract price, less the damages sustained in consequence of the breach of warranty." 30 Am. & Eng. Ency. Law (2d ed.), 197, par. d.

"The buyer may not pursue two inconsistent remedies; if he chooses to exercise the special remedy by returning the article to the seller, he is then confined to a recovery of the purchase money paid, and cannot maintain an action to recover damages for a breach of the warranty." See authority last cited, p. 199, par. g.

The same rule is very clearly stated in *Abraham Bros. v. Browder*, 114 Ala. 287, 21 South. 818. From page 290 we excerpt the following:

"There must be a subsisting contract to support an action for a breach of warranty. If the facts justify it, a buyer may rescind a contract and sue for the purchase money paid; or he may sue and recover damages for a fraud practiced upon him; or he may affirm the contract and maintain an action for breach of warranty. He cannot insist that a contract has been rescinded, and yet recover on the contract."

In *Park v. Richardson & Boynton Co.*, 81 Wis. 399, 51 N. W. 572, the court had under consideration an instruction which permitted the purchaser to recover as damages both what he had theretofore paid and any damage which he sus-

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tained by reason of the failure of the article purchased to meet the requirements of the warranty. The court said:

"This was certainly error, because it blends two distinct rules of damages, one of which is applicable to the action for rescission, and the other to the action for breach of warranty. If the action be one to rescind the sale and recover back the purchase money under the provisions of the contract of sale, then the latter part of the instruction should not have been given."

The respondent, after the breach of the contract was established, properly claimed the right to have the money refunded which he had paid as freight on the harvester from the factory to the point of destination. This was a part of the purchase price. If the machine would not harvest his crop as it was warranted to do, he had a right to a return of this amount. This he had properly pleaded. The fact that he also pleaded items of damages which were not recoverable upon an election to rescind the contract does not preclude the recovery of this item. Whilst it is true that the respondent in his answer did not formally tender a return of the harvester, yet he pleaded that it had no value, and that there was an entire failure of consideration.

The case, however, as we view it, was tried on the theory that there had been a rescission of the contract by the respondent. The appellant introduced in evidence a letter which had been written to it by the respondent, bearing date September 3, 1907, in which it is stated: "Your combined harvester has not proven satisfactory. I have given it up." The respondent when on the witness stand in his own behalf upon cross-examination, testified that he made no claim to the machine. This view is strengthened by one of the court's instructions wherein, in directing the jury as to the different kinds of verdicts which it could return, the court said:

"The Court: I am furnishing you, gentlemen, three forms of verdict. One is a verdict in favor of the Houser & Haines Manufacturing Company and assesses the plaintiff's damages at the sum of \$1,600 with interest at ten per cent per annum

from August 1st, 1907. If you should find for the plaintiff, that will be your verdict. The other is, 'We, the jury, find for the defendant in the sum of dollars.' If you should find in favor of the defendant, James McKay, and further find he is entitled to damages from the plaintiff, you will insert in there the amount of damages he is damaged. And the other form is in favor of the defendant, James McKay. If you should find in favor of the defendant, James McKay, and should not find for him any damages, then you will sign that form of verdict."

The \$1,600 and interest was the purchase price according to the contract. Admittedly this instruction could only be correct on the assumption that the case had been tried on the theory that the respondent had rescinded the contract. If he were seeking to assert a counterclaim for his damages, that course would necessarily imply that he had elected to accept the machine, and the appellant could then recover the difference between the contract price and the value of the machine as it was delivered to the respondent, less such damages, if any, as resulted directly and proximately from the failure of the appellant to comply with its contract and furnish a machine that would do the work which it was warranted to do. This was not submitted to the jury.

Moreover, the respondent has set forth his affidavit in his brief in which he states that the appellant has accepted the machine since the cause was tried. There is an admission of this statement in the reply brief. Upon the issues as joined in the pleadings, and under the evidence which was admitted without objection, the jury should have been instructed as to the measure of damages in case they found that the machine was not what it was warranted to be, and there had been a rescission of the contract by the respondent. The measure of damages in such case would be the amount of freight which the respondent had paid on the machine. As we have said, this freight was in effect a payment upon the purchase price. It was contemplated between the parties that the appellant should manufacture the machine at its factory in the city of

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Stockton, in the state of California, and that it should ship it to the respondent at Wilbur, Washington, where it was to be used for harvesting purposes. The purchase price was \$1,600, plus the freight between such points. It follows, therefore, that the court committed error in giving the instruction complained of.

Reversed and remanded for a new trial. The appellant will recover its costs on this appeal.

RUDKIN, C. J., CROW, MOUNT, MORRIS, and PARKER, JJ., concur.

FULLERTON, J., dissents.

DUNBAR, J. (dissenting).—I dissent. The majority opinion, in my judgment, deprives the respondent of a right which the law gives him. There is no insufficiency of facts pleaded. The machine was worthless to respondent; hence he ought to have his purchase money back. By reason of relying on the representations made when he bought the machine, he is damaged; hence he ought to recover his damages. Must he be driven to the expense and delay of two actions, in face of the universal sentiment and judgment of courts that a multiplicity of suits should be avoided? Such a practice would not be tolerated by this court for one moment. Then, if he is not allowed to join his causes of action, as is decided in this case, he must of necessity lose one of his causes of action and be deprived of a legal right. To illustrate: If A purchases a horse of B for \$300, under a warranty that the horse is a safe driving horse, and instead he proves to be vicious and wild and, when he is hitched up, runs away, demolishing A's carriage, which is worth \$300, it is evident that A is injured in the whole transaction \$600, \$300 for the purchase price of the horse, which is useless to him, and \$300 for the loss of the carriage. And yet this court, in effect decides that he must keep the horse, which he cannot use and which is a source of constant expense to him, in order to recover for damages to his carriage; or, if he desire to recover the

purchase price of the horse, he must lose his claim for damages to his carriage. This is a simple but true and practical illustration of the effect of the rule adopted by the majority.

Many cases are cited to sustain the doctrine announced in the majority opinion, and I am free to confess that the weight of authority sustains the opinion. But such authorities do not reflect the spirit of our code. It is said in one of the cases cited:

"The buyer may not pursue two inconsistent remedies. If he chooses to exercise the special remedy by returning the article to the seller he is then confined to a recovery of the purchase money paid and cannot maintain an action to recover damages for a breach of the warranty."

Of course, he should not pursue two inconsistent remedies. But, under the provisions of the code, he is not pursuing two inconsistent remedies. These cases assume the very question in controversy, viz., whether the remedies are inconsistent, and so assuming instead of determining, such decisions, numerous as they may be, should have no weight whatever. Our code has done away with many of the technicalities and all of the fictions which were tolerated by the common law in pleadings, and it has substituted a plain statement of the facts constituting a cause of action. The essential idea of the code is simplicity. It provides in the first place, that all forms of actions heretofore existing shall be abolished; that there shall be but one form of action; that every action shall be prosecuted in the name of the real party in interest; a simple summons is provided for, and then comes the crowning provision that the complaint shall contain a plain and concise statement of the facts constituting the cause of action. This complaint is met by an answer which denies or admits the allegations of the complaint, or makes a simple statement of any new matter constituting a defense. There the litigants are before the court in a simple and effective way to try out the controversy made by the pleadings. The statute

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also specially provides that the plaintiff may unite several causes of action in the same complaint when they all arise out of a contract express or implied.

The controversy in this case is a controversy which is commensurate with the whole transaction, and certainly arose out of a contract. The contract expressed was to furnish a machine which would do the work it was represented to do; the implied contract was responsibility for all damages arising from its breach as naturally and proximately resulting from the breach of the warranty. And when it is admitted and proved that there was a violation of the contract, and that by reason of such violation the character of damages which we have mentioned accrued, there seems to me to be no reason in the world for compelling the defendant to lop off and lose a portion of his loss which arose from a violation of the contract. Again, the statute permits, and this court has decided in *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1033, that even where a complaint sets forth facts tending to show liability both in tort and on contract, such recital is not open to objection on the ground of stating more than one cause of action, when such facts all relate to a single transaction and are relied upon as the basis of a single cause of action, the court in that case saying:

"This complaint simply set out in an orderly manner a statement of the facts relating to the transaction which was relied upon to show that the plaintiff was entitled to recover a judgment against the defendants; and while some of the facts so alleged may have tended to show that a contract was entered into between the bank and the defendants, and others to show wrongful action on the part of the defendants and the bank, they all related to a single transaction and were properly included in a single count. Whether a claim of relief is rightfully founded upon a contract relation entered into, or wrongful acts done, where but a single transaction is relied upon, the recital of the facts relating to such single transaction is not open to objection, for the reason that such recital may tend to show a liability upon contract and also in tort."

Here it cannot be gainsaid that the causes of action which are alleged all arose out of the same transaction, viz., the contract to furnish a machine which would do good work, and the damages flowing from the violation of the contract. The trouble arises from an attempt on the part of the court to classify, when the law especially repudiates classification, and demands of the plaintiff a statement of the facts which constitute all of his cause of action. Under the law the court is authorized to try the case as made by the pleadings and grant any relief embraced in the issues, and it cannot be said that the relief demanded is not embraced in the issues.

But, even under all the technical rules and fictions of the common law, this action would be sustained and defendant would be allowed to recover the damages proven in the case. On the other questions discussed I express no opinion.

CHADWICK, J., concurs with DUNBAR, J.

[No. 7358. Decided May 28, 1909.]

WASHINGTON DREDGING & IMPROVEMENT COMPANY,
Appellant, v. THE STATE OF WASHINGTON *et al.*,
Respondents.¹

JUDGMENTS—VACATION—EQUITY—LACHES—DELAY IN SUIT AFFECTING TITLES. A suit in equity to set aside judgments affecting the title to numerous lots will be dismissed for want of equity, where there was gross and unexplained laches in failing to commence the action for many years after entry of the judgments.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered November 30, 1907, upon sustaining demurrers to the complaint, dismissing an action to vacate a judgment, after a trial on the merits before the court. Affirmed.

¹Reported in 101 Pac. 884.

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Opinion Per Crow, J.

Shepard & Flett, Thomas M. Vance, and Will H. Thompson, for appellant.

G. E. de Steiguer, Ballinger, Ronald, Battle & Tennant, Higgins, Hall & Halverstadt, Farrell, Kane & Stratton, William A. Greene, Hughes, McMicken, Dovell & Ramsey, William L. Waters, Lewis & Legg, H. A. P. Myers, Fred H. Peterson, H. C. Force, Shank & Smith, L. C. Gilman, Bogle & Spooner, Guie & Guie, Bausman & Kelleher, Humphries & Cole, B. S. Grosscup, A. G. Avery, Walter S. Fulton, S. D. Wingate, Scott Calhoun, John D. Atkinson, C. A. Kinnear, John P. Hartman, Tom Alderson, D. C. Conover, T. H. Shelley, Reed & Hardman, Graves, Palmer & Murphy, Larrabee & Wright, Metcalf & Jurey, Peters & Powell, Walter B. Beals, Ira Bronson, D. B. Trefethen, F. J. Carver, Sachs & Hale, Kerr & McCord, and Morris, Southard & Shipley, for respondents.

Crow, J.—This is an action in equity commenced in the superior court of Thurston county, against the state of Washington, E. V. Bussell, and one hundred and thirty-eight others, to vacate and set aside certain judgments, orders, and decrees, and obtain other equitable relief. The second amended complaint, to which the several defendants demurred on all statutory grounds, was filed on November 15, 1907. On the hearing of the demurrers it was stipulated that certain records, now included in the transcript, should be considered with the second amended complaint and as a part thereof. The demurrers were sustained and, upon plaintiff's refusal to further plead, the action was dismissed. Plaintiff has appealed.

This litigation pertains to numerous tide land lots in the city of Seattle, and to appellant's alleged claim of a preference right to purchase the same. It arises out of, and relates to, applications, controversies, and disputes heretofore considered by this court. See: *State ex rel. Washington Dredg. & Imp. Co. v. Moore*, 21 Wash. 629, 59 Pac. 505;

Washington Dredg. & Imp. Co. v. Kinnear, 24 Wash. 405, 64 Pac. 522; *State v. Washington Dredg. & Imp. Co.*, 43 Wash. 508, 86 Pac. 936; *State ex rel. Washington Dredg. & Imp. Co. v. Ross*, 44 Wash. 698, 87 Pac. 1151.

Appellant primarily bases its present claim to relief upon its written application No. 1747, for the purchase of certain tide lands, which it filed in the office of the commissioner of public lands on May 13, 1895. A statement of subsequent proceedings had on this application, of appeals taken by appellant, of their dismissals by the superior court of King county, of the dismissals of subsequent appeals by this court, and of the litigation generally, may be found in our opinion in *State v. Washington Dredg. & Imp. Co.*, *supra*. All of the relief appellant now asks is based primarily upon its attempt to have all of the previous judgments, decrees, and orders entered against it set aside and vacated in this action, so that its original application No. 1747 may be held to be still pending, that the same may be heard and considered, and that appellant may be decreed to have the preference right to purchase tide lands therein mentioned. Other relief asked need not be stated, as none of it could be granted in this action, unless such judgment, decrees, and orders be first vacated as a condition precedent to further proceedings therein.

Appellant in its brief concedes that, if this action is a collateral attack upon the judgments, decrees, and orders mentioned, they must then be regarded as valid, unless void upon their face, or entered without jurisdiction. They all appear to be regular on their face, notwithstanding appellant's contention to the contrary, and we do not find allegations in the second amended complaint sufficient to show that they were entered without jurisdiction. Appellant, however, contends that this being a proceeding in equity to vacate and set aside the orders and judgments mentioned for want of service of process upon appellant, for want of jurisdiction thereof, and for fraud practiced by the respondents in obtaining numerous

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Opinion Per CROW, J.

judgments in their favor, the attack is not collateral, but direct.

The respondents, conceding that an action in equity to set aside and vacate a judgment, when prosecuted in the proper forum, is a direct attack, contend that this action cannot be regarded as a direct attack, for the reason that it was not commenced in the superior court of King county where the judgments and orders were originally entered. They insist that, if the judgments can be set aside, it can only be done upon petition filed in the superior court of King county within one year after their rendition. We do not think it necessary to enter upon a consideration of the jurisdiction of the superior court of Thurston county to vacate or set aside judgments rendered by the superior court of King county. The record shows that all of the judgments, decrees, and orders of which the appellant complains were entered many years prior to the commencement of this action. There has been such gross and unexplained laches on the part of the appellant in commencing this action as to forbid its consideration by a court of equity. For that reason alone the demurrers were properly sustained.

We are not inclined to enter upon a detailed discussion of the second amended complaint. It fails to state a cause of action. This litigation has been before this court repeatedly, and in every conceivable phase. In every instance judgments have been entered against appellant's contention. In *State v. Washington Dredg. & Imp. Co.*, *supra*, we quoted at length from our previous opinion in *Washington Dredg. & Imp. Co. v. Kinnear*, *supra*, and then said:

"The judgment just cited was the third disposition of this cause, and it seems to us that it finally and clearly disposed of the case, and relegated it to the realms of 'finished business.' "

Appellant has nevertheless instituted and prosecuted this later action, which seems to have been commenced, and supplemented by another *lis pendens* notice filed in the office of

the auditor of King county, with the sole design of clouding the titles to a vast number of tide land lots, in and to which the one hundred and thirty-nine respondents have severally acquired leasehold and other estates. Such litigation should not be encouraged by the courts. The judgment is affirmed.

ALL CONCUR.

[No. 7903. Department Two. June 1, 1909.]

MARY E. TOWN, *Respondent*, v. MEDOREM W. GREER *et al.*,
Appellants.¹

DEEDS—DESCRIPTION—INTENT—MISTAKE—VENDOR AND PURCHASER—BOUNDARIES—MARKED ON GROUND. A deed of the southwest quarter of a section is shown by the contemporaneous acts of the parties to have been executed by mistake as to the description of the tract intended to be conveyed, where it appears that the government quarter corner on the west side of the section was originally located by mistake nearly twenty chains north of its proper location, that when the deal was made this fact was unknown to the purchaser, who refused to consummate the deal until all the corners were located by a survey, whereupon a deputy county surveyor, with the parties attending, located all the corners except the unknown quarter corner, which could not be found, and which he re-established half-way between the north and south lines of the section, and that the deal was thereupon consummated by the deed in question, and a fence was built on the line established by the survey, and possession taken and maintained by the parties for years in accordance with such survey and in ignorance of the true location of the quarter corner.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 31, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

¹Reported in 102 Pac. 239.

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Opinion Per PARKER, J.

John A. Shackelford and Hayden & Langhorne, for appellants.

Ira A. Town, John C. Stallcup, and M. B. Stallcup, for respondent.

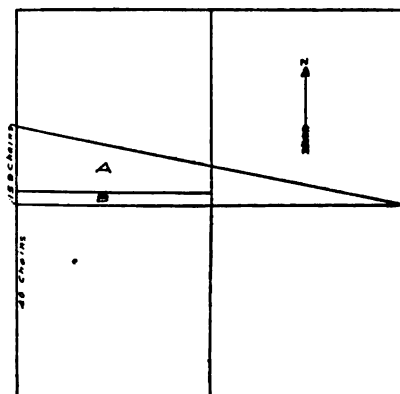
PARKER, J.—This is an action of ejectment tried by the court without a jury, in which the plaintiff seeks to recover from the defendants a tract of land described in her complaint as follows:

“Beginning at a point on the west line of section number thirty (30), township number twenty (20) north, range three (3) east of the W. M., forty (40) chains north of the southwest corner of said section, run thence east parallel with the south line of said section, thirty-seven and two one-hundredths (37.02) chains to a line connecting the quarter posts on the north and the south lines of said section; thence north on said last mentioned line, seven and three-fourths ($7\frac{3}{4}$) chains to the intersection of the line connecting the quarter posts on the east and west lines of said section; thence westerly, bearing northerly along said last mentioned line to the quarter post on the west line of said section, (which quarter post is 55.9) chains north of the southwest corner of said section; thence south on said west line of said section to place of beginning, excepting from above description the south ten acres thereof, extending of even width across the south side from east to west boundary.”

Both parties claim title through mesne conveyances from George H. Greer and wife, who in 1882 owned all of the west half of the section. On October 10, 1882, George H. Greer and wife conveyed to William Squire, by warranty deed, land therein described as the southwest quarter of this section, with other lands, in all 804 acres more or less; in 1895 Squire and wife executed a quitclaim deed to their daughter Hannah S. Ward for the land involved in this action, describing it as in plaintiff's complaint, including the ten-acre strip along the south boundary thereof; and in 1905, Hannah S. Ward and husband executed a quitclaim deed to the plaintiff for the land involved in this action, describing it as in plain-

tiff's complaint. The defendants are in possession of the land here involved, under conveyances from George H. Greer and wife.

Two main questions presented under the pleadings and evidence in this action are: First. Is the land here involved in the northwest or the southwest quarter of the section? And this in turn involves the dispute between the parties as to the original location of the quarter post or corner on the west line of the section; the plaintiff contending that it is 55.9 chains north of the southwest corner of the section, and the defendants contending that it is only 40 chains north of the southwest corner of the section, where the law presumes it to be. Second. Were the contemporaneous acts and understanding of the parties to the deed of October 10, 1882, whereby Greer and wife conveyed to Squire the southwest quarter of the section, such that the north line of the land thereby conveyed was a line 40 chains north of and parallel with the south line of the section? The pleadings are so framed as to present both of these questions. The accompanying plat shows the land in controversy, as well as the relative disputed locations of the quarter post on the west line of the section, tract "A" being the land in dispute, and "B" the ten-acre tract.



The trial court made findings favorable to the plaintiff's contention as to the original location of the quarter post be-

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ing 55.9 chains north of the southwest corner of the section, and that the land involved is in the southwest quarter of the section, all of which was duly excepted to by the defendants' attorneys. The trial court also refused to make findings favorable to the defendants upon the question of the understanding and intention of the parties to the deed of October 10, 1882, from the Greers to Squire, as to the north boundary of the land conveyed, which findings were requested and their refusal excepted to by the defendants' attorneys so as to present that question here for review. Judgment was rendered by the court for the plaintiff, from which the defendants have appealed to this court.

From a careful reading of all of the evidence, we conclude that the following facts are established, touching the question of the intention of the parties to the deed of October 10, 1882, as to the north boundary of the land conveyed. At the time of the negotiations between the parties leading up to the making of the deed from the Greers to Squire of October 10, 1882, the location of the quarter corner on the west line of the section was unknown to them, there being no stake or monument at the point 40 chains north of the southwest corner and equidistant between southwest and northwest corners of the section, nor any stake, monument, or witness trees, at any other point on or near the west line of the section then known to them. Squire insisted that the boundaries and corners of the land that he was purchasing from Greer should be ascertained by survey before closing the transaction. Thereupon, in compliance with the understanding between them, Greer employed Charles H. Ballard, a deputy county surveyor of Pierce county, to locate the lines and corners, in order that Squire would be satisfied as to where such lines and corners were, and also as to the quantity of land he was acquiring, it being then understood between the parties that the amount of land to be conveyed was 300 to 304 acres.

Ballard testifies that, just before commencing the survey,

he had a conversation with Squire, in which "Mr. Squire said that he would not pay any money on the place until each corner was established by the county surveyor or his deputy." Squire also testifies, "It was not my intention to pay anything on the price of the land until I knew that I was getting the amount of land I supposed I was getting." Greer's testimony touching the attitude of both himself and Squire upon this matter is along the same line. Ballard proceeded with the survey accordingly, both Greer and Squire accompanying him a considerable portion of the time he was at work. When he came to the locating of the quarter post or corner on the west line of the section, he was unable to find the corner or witness trees called for in the government field notes, a copy of which he had with him. He then (using his own words) "Re-established said corner by chaining the whole of the west boundary of said section thirty, and placing said corner equidistant from the northwest and southwest corners." He also established the center of the section at the crossing of the lines from opposite quarter corners. He was able to find the original location of all the other quarter corners and section corners by the witness trees or monuments. There is no evidence in the record indicating that any of these were established upon the ground by the government survey at any other points than the law presumes them to be, except the quarter corners on the north and south boundaries of the section are nearer the west than east boundary because the west boundary is also the township boundary, resulting in fractional subdivisions on the west. This survey of Ballard's demonstrated that the land was approximately the amount Squire believed he was acquiring. Thereafter the purchase was consummated, and the deed of October 10, 1882, executed. Soon thereafter a fence was built upon the land, running east from the quarter corner as established by this survey. This fence was built by consent of Squire if not at his instance. Greer maintained possession up to the fence on the north side, while Squire maintained possession

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up to the fence on the south side. This continued for some years, but just how long is uncertain. In any event after the fence was removed, as it seems to have been some years later, and the land again became unenclosed on both sides of the line, neither party or their respective grantees ever assumed possession beyond the line where the fence had been originally constructed.

It is plain from the evidence that the quarter corner established by Ballard's survey, and the line running east therefrom on which the fence was built, is the same point and line, 40 chains north of the south line of the section, described in the quitclaim deed of Squire and wife to Hannah S. Ward in 1895, and described in the quitclaim deed of Hannah S. Ward and husband to the plaintiff in 1905, and also described in plaintiff's complaint in this action. Some four or five years after the sale and conveyance of October 10, 1882, from Greer to Squire was consummated, certain trees seeming to answer the description of quarter corner witness trees called for in the government field notes were discovered near the west line of the section, indicating that the original quarter corner was located 15.9 chains north of the quarter corner established by Ballard. Up to the time of the discovery of these trees, none of the parties had any knowledge by which they might be lead to believe or suspect that the true quarter corner was other than the one established by Ballard. Whatever effect these facts would have upon the rights of the original parties in determining the north boundary of the land conveyed, they would have the same effect upon the rights of Hannah S. Ward, grantee of Squire and wife, and the plaintiff, grantee of Hannah S. Ward and husband, since we are convinced from the evidence that these subsequent claimants to the land under Squire and wife had such knowledge as would bind them to take notice of such facts.

Assuming that the original location of the quarter corner by the government survey was at the point 15.9 chains north of the quarter corner established by Ballard, which

question we do not decide, we are of the opinion that the deed of October 10, 1882, from the Greers to Squire, was executed by mutual mistake as to the description of the southwest quarter, and that all the parties to that deed believed it conveyed, and they actually intended that it should convey, only the land south of the quarter corner and line running east therefrom, which was then established by Ballard, the deputy county surveyor, 40 chains north of the south line of the section, and on which the fence was thereafter built.

The defendants are in possession, and, while they are not seeking affirmative relief, the issues are so framed by the pleadings as to entitle them in their defense to prove mutual mistake and the real intention of the parties to the conveyance of October 10, 1882, as if they were seeking to reform the deed in a suit in equity. Under our system of procedure, "The superior title, whether legal or equitable, shall prevail." Pierce's Code, § 1144 (Bal. Code, § 3629). The mistake in this case was one of fact only. True, it was not a mistake in the language of the description in the deed, but it was a mutual mistake as to the land the language of the description applied to, if the original quarter section corner is as plaintiff claims. The following language from this court in *Jenkins v. Jenkins University*, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785, where a mortgage was sought to be reformed, is quite applicable to this situation:

"It is true the terms of the mortgage were stated according to the intent of both parties, but there was a material error upon the part of both of them in respect to the thing to which the terms applied, and we are of the opinion that the authorities sustain the appellant's contention in this respect, and that he was entitled to a reformation of the instrument."

A mere glance at the accompanying plat will show how very far the government survey departed from the legally presumed location of the quarter corner, if the real quarter corner was located as claimed by the plaintiff. Such loca-

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tion, at a point more than one-third of the distance from the equidistant point to the northwest corner of the section, was certainly such a location as these parties never contemplated as determining the north line of the land intended to be conveyed. It is true that when land is conveyed and described by a designated subdivision of a section it ordinarily means the government subdivision. But this is not necessarily true under all circumstances. As was said by this court in *Squire v. Greer*, 2 Wash. 209, 26 Pac. 222, a case involving this same land:

"This was a conveyance between private parties; and if the intention was to convey a certain definite piece of land, and especially if the land was actually located, that could be shown, or any circumstance tending to show the intention of the parties. In conveyances by private parties descriptions by legal subdivisions are used for convenience, and it would be a hard and unjust rule to hold parties to a conveyance of property not intended to be conveyed, through mistaken understanding of where a government line was located, especially when it can be shown that the government survey was misleading, and the lines of survey deviated from their proper and intended course."

Our conclusions upon this branch of the case renders it unnecessary to discuss other questions involved. We are of the opinion that the defendants are entitled to the relief prayed for in their answer, which is that "The plaintiff take nothing by her action, that this cause be dismissed and that the defendants have their costs and disbursements herein." The judgment of the superior court is reversed, with instructions to enter judgment in defendants' favor as prayed for.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8012. Department Two. June 1, 1909.]

PETER MCPHERSON, *Appellant*, v. SEATTLE ELECTRIC
COMPANY, *Respondent*.¹

DISMISSAL AND NONSUIT—VOLUNTARY RIGHT TO. Under Bal. Code, § 5085, the plaintiff has an absolute right to a voluntary nonsuit, even though the action is tried before the court without a jury, at any time before submission of the case; and the case is not submitted where the plaintiff asked the nonsuit before resting because of the absence of necessary witnesses.

APPEAL—REVIEW—CROSS-APPEALS—ERRORS ALLEGED BY RESPONDENT. Upon appeal by plaintiff from the erroneous denial of a nonsuit, the defendant cannot by a cross-appeal secure a review of the merits, as the court was without jurisdiction except to grant the nonsuit.

APPEAL—REVIEW—ERRORS REVIEWABLE. Upon appeal from the denial of a voluntary nonsuit to which plaintiff was entitled as a matter of right, plaintiff cannot have a review of error of law occurring at the trial; since his remedy by nonsuit and a new action is complete.

Appeal from a judgment of the superior court for King county, D. G. Wooten, Esq., judge *pro tempore*, entered February 13, 1909, dismissing an action for personal injuries, after a trial on the merits before the court without a jury. Reversed.

John T. Casey (*Heber McHugh*, of counsel), for appellant.

James B. Howe and *A. J. Falknor*, for respondent.

DUNBAR, J.—This is an appeal from a judgment of the superior court of King county, in favor of the defendant, dismissing plaintiff's case on the merits, and for costs. The action was for damages for personal injuries. Defendant's witnesses were allowed to testify out of order, awaiting the appearance of the plaintiff's medical witnesses, it being agreed that the medical testimony might be put in at the

¹Reported in 101 Pac. 1084.

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close of defendant's case. At the close of plaintiff's case, motion was made by the defendant for a nonsuit, which was overruled. At the close of defendant's evidence, plaintiff was unable to secure the attendance of his doctors. The court was not inclined to postpone the case for the purpose of obtaining the testimony, and the plaintiff made a motion for a voluntary nonsuit. This, counsel for defendant opposed, and the court overruled the motion. Defendant then moved for judgment, which was granted by the court. Motion was made for a new trial, and denied; judgment was entered dismissing the action, and appeal followed.

Section 727 of Pierce's Code (Bal. Code, § 5085), is as follows:

"An action may be dismissed, or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself, at any time, either in term time or in vacation, before the jury retire to consider their verdict, unless set-off be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject-matter of the action. . . ."

We held, in *Fisk v. Tacoma Smelting Co.*, 49 Wash. 514, 95 Pac. 1082, that the terms of this statute were so certain and definite as to preclude construction. In this case, as in that, there was no set-off interposed or counterclaim set up, for it cannot be reasonably asserted that a plea of contributory negligence is a counterclaim or set-off within the meaning of the statute. It is contended, however, by the respondent that this case can be distinguished from the case just cited, from the fact that in the case at bar the trial was had before the court, a jury having been waived, and that the case was submitted to the court when the testimony was produced. But, while it may be true that all the testimony in relation to the question of contributory negligence had been submitted to the court, the testimony was not all in, and the appellant was asking for time to bring before the court the medical testimony which he desired to introduce.

So that the case had not been submitted, in the sense in which it is submitted to a jury at the time they retire to consider their verdict under instructions of the court, and there seems to be no good reason for making a distinction between the rights of the plaintiff in a case that is tried before a jury and those in one which is tried by the judge. This statute confers upon the plaintiff an absolute right to dismiss his cause or take a judgment of nonsuit, and the granting of that right is therefore not discretionary with the court. If it were discretionary, there are many points raised by the respondent's brief which it might be interesting to consider, but which are immaterial under our view of the right conferred by the statute.

The respondent has thought it necessary, to protect its interests on the merits of the case, to prosecute a cross-appeal, and has brought up a statement of facts in which are involved the merits of the case. But the merits of the case cannot be considered by the court on this appeal, for the reason that, when the appellant asked for a nonsuit, the court had no jurisdiction to pass upon any other question, and no right to do aught but to grant the motion, and any further proceeding of the court was entirely without jurisdiction and void.

The appellant asks that the judgment be reversed and a new trial granted, and claims that, under the provisions of Pierce's Code, § 707 (Bal. Code, § 5071), he is entitled to a new trial for error in law occurring at the trial and excepted to at the time. But the real error which was committed by the court in this case was in refusing to sustain the appellant's motion for a nonsuit. If the court had granted that motion, the appellant would not have been entitled to a new trial, but would simply have had the right to bring another action without prejudice. It was from that ruling of the court that he has appealed, which ruling constitutes his real grievance, and when the judgment is reversed and the cause remanded with instructions to the lower court to

grant him the nonsuit which he prayed for, his remedy is complete.

The judgment is therefore reversed, with instructions to grant appellant a nonsuit as asked for.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 7794. Decided June 3, 1909.]

THE STATE OF WASHINGTON, *on the Relation of D. E. Lyon et al., Appellants*, v. POLICE COURT OF THE CITY OF HOQUIAM *et al., Respondents*.¹

PROHIBITION—TO COURTS—RESTRAINING PROSECUTION. Prohibition does not lie to a police judge to prevent the trial of a criminal charge upon the grounds of error in refusing a change of venue and the unconstitutionality of the law sought to be enforced; as there is a plain, adequate, and speedy remedy by appeal or writ of review.

Appeal from an order of the superior court for Chehalis county, Irwin, J., entered August 11, 1908, denying a writ of prohibition to restrain a prosecution for the violation of a city ordinance, after a trial on the merits before the court. Affirmed.

W. H. Abel, for appellants.

Sidney Moor Heath, for respondents.

FULLERTON, J.—On August 8, 1908, the appellants applied to the superior court of Chehalis county for a writ of prohibition, averring that they had been charged with the offense of violating an ordinance of the city of Hoquiam, a city of the second class, and had been brought before one Seth Warren, police judge of that city, for trial; that the ordinance which they were accused of violating was unconstitutional and void and too uncertain in its terms to be en-

¹Reported in 101 Pac. 1082.

forced; that when they were brought before the police judge they entered a plea of not guilty to the offense charged, and moved the court for a change of venue, on the ground of actual bias against them on the part of the police judge; that the police judge wrongfully and unlawfully refused to grant a change of venue, and wrongfully and unlawfully insisted on the immediate trial of the offense charged, setting the cause down for trial for August 8, 1908, at 10 o'clock a. m.; that they could not have an impartial trial before the police judge, and that the police judge had theretofore taken the position that the relators were not entitled to a fair trial, and would wrongfully and arbitrarily try the cause unless prohibited by the court. A copy of the affidavit filed before the police judge for a change of venue was attached to the application.

An alternative writ was issued returnable on August 11, 1908, at which time the court discharged the writ on the ground that the appellants had no right to a change of venue, and had a right of appeal from any judgment the police judge might enter against them. From this order, the present appeal was taken.

We think the court rightly refused to grant the writ on the second ground stated. The writ of prohibition under the statute lies to an inferior court only when that court is acting without or in excess of its jurisdiction, and there is no plain, speedy, or adequate remedy in the ordinary course of law from the decisions it renders or may render. It does not lie merely because the court decides erroneously, or acts without or in excess of its jurisdiction; but there must be no other remedy either by appeal or writ of review from its decision before the writ will lie. Here there is no question that the relators have a speedy and adequate remedy in the ordinary course of law from any judgment the police court may enter against them. The statute relating to appeals and to writs of review are ample to secure a review in the higher tribunals of any judgment of an inferior court whose

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judgment may be reviewed under the restrictions imposed by the constitution.

The court feels also that it is necessary to enforce this rule with strictness. If a party may, on a trial before a police judge, have a writ of prohibition on the theory that the court is acting without or in excess of jurisdiction, every time that court rules against his contention, trials in such courts will become a farce, and there will be no such thing as punishment for petty offenses. Suppose for example, that we entertained the present writ, determined the questions suggested on their merits against the appellants, and sent the case back for further proceedings, is there any reason why they might not sue out another writ, based on a contention similar to the one they are invoking now, on the first ruling that court makes in the case which disagrees with their ideas of their rights in the matter? And if this be possible, why may not a third or fourth or a fifth writ be sued out before the trial reaches its end? But such a practice would be intolerable. It is the policy of the law, and the practice should be so regulated, that a person accused of crime before an inferior court shall have a continuous trial interrupted only by the necessary adjournments; and when judgment is pronounced in the case, if it be against him, one review of the judgment, in which all the questions that arose in the trial and which he believes were erroneously decided to his prejudice, can be examined by the appellate tribunals for error. As we said in *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395:

"As a general rule, the legislature of this state has deemed an appeal from the final judgment an adequate remedy for the correction of all errors committed in the course of a trial, and, ordinarily, an erroneous ruling on a question of jurisdiction is no exception to this general rule. Had the court below ruled that the complaint stated a cause of action, or denied a motion to quash the summons, or the service thereof, it would be just as important to the relators, and

just as desirable from their standpoint, to obtain a ruling from this court on these questions, in advance of the hearing on the merits, as in the case at bar; yet, all will concede that such questions can only be reviewed on an appeal from the final judgment. . . .

"It is the general policy of our law that cases shall come to this court but once, and that the decision of this court shall be based on the merits of the entire controversy. The question here presented is no exception to this rule. . . . We again announce the rule that the adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction; and that the adequacy of the remedy by appeal does not depend upon the mere question of delay or expense. There must be something in the nature of the action or proceeding that makes it apparent to this court that it will not be able to protect the rights of the litigants or afford them adequate redress, otherwise than through the exercise of this extraordinary jurisdiction."

See, also, *State ex rel. McCalley v. Superior Court*, 51 Wash. 572, 99 Pac. 740.

The order appealed from will be affirmed.

RUDKIN, C. J., CHADWICK, PARKER, DUNBAR, MOUNT, CROW, and GOSE, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 7820. Department One. June 3, 1909.]

TIFFT COMPANY, *Respondent*, v. STATE MEDICAL INSTITUTE,
Appellant.¹

INJUNCTION—GROUNDS — COTENANTS — IRREPARABLE DAMAGE—EVIDENCE—SUFFICIENCY. In an action between cotenants the evidence fails to show such substantial or irreparable injury as to warrant an injunction to restrain the partitioning of a common entrance to a building, where the area or recess in the building would have been divided so as to give defendant a four-foot passageway to a stairway and the plaintiff a six-foot entrance to the back door of its saloon, without any appreciable interference with light; since injunction will rarely be granted in favor of a cotenant except in case of insolvency or partial destruction of the estate.

Appeal from a judgment of the superior court for King county, Morris, J., entered May 12, 1908, granting to plaintiff an injunction, after a trial on the merits before the court. Reversed.

Jay C. Allen, for appellant.

Guie & Guie, for respondent.

CHADWICK, J.—Robert Abrams is the owner of a building, located at the corner of Second Avenue South and Washington street, in the city of Seattle. The Seattle Brewing & Malting Company held a lease for the lower floor, and had sublet to Tift Company, a corporation, who occupied the storeroom as a saloon. The upper floor had been leased to one Linde, who had sublet certain rooms, together with a stairway leading down to Washington street, to the State Medical Institute, a corporation. The rooms occupied by defendant were so arranged that the only entrance to them was from Washington street. There were three entrances to the saloon, one on Second Avenue South, one on Washington street near the corner, and one on the same street leading into the back part of the saloon. The stairway spoken of

¹Reported in 101 Pac. 1081.

landed flush with the back door of the saloon, on an area way about ten feet long with an inset of about four feet. The defendant had begun the erection of a partition between the landing of the stairway and the back door of the saloon, which, if carried out to the sidewalk line, would have divided the area or recess in the building, leaving an entrance four feet wide into the stairway and six feet wide into the saloon door. Upon this state of facts, plaintiff brought this action, alleging an interference with the entrance way to the saloon, a shutting off of light, and "incalculable damage." A trial on the merits was had in the court below, resulting in a decree perpetually enjoining defendant from the erection or maintenance of the partition, from which decree defendant has appealed.

The statement of the facts is a statement of the whole case, and the only question for review is whether the evidence warrants the findings of the trial court. The evidence shows that the light was not interfered with to any appreciable extent, and, bearing in mind the width of the recess, it would seem that we could say, in the absence of all testimony, that it would not. Nor does it appear how or why the free ingress or egress of patrons of the saloon could be interfered with by the existence of the partition. Upon the record now before us the damages, if any, are fanciful rather than real.

No authorities are cited by counsel that bear in any degree on the concrete question presented, but when we consider that the parties are in a sense tenants in common of the area or recess; and, without indulging in the citation of authorities upon elementary principles, that ejectment would not lie on the part of one cotenant against another, that trespass would not lie except in a case of complete ouster, and that the remedy of injunction is rarely indulged in favor of a cotenant, and then only upon a showing of insolvency, or that the threatened act will result in partial or total destruction of the estate, we may well say that respondent has

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suffered no injury of which a court of equity will take notice.

In a somewhat similar case a tenant sought to enjoin his cotenant from the maintenance of a saloon in the common property. The court said:

"Manifestly, unless appellant suffers from the saloon some special injury to its property, not suffered in common by the public—some substantial violation of its legal rights, and not a mere theoretical or fanciful wrong—it has no cause to complain." *Oglesby Coal Co. v. Pasco*, 80 Ill. 164.

It is a fundamental proposition that equity will not interfere by injunction unless the threatened wrong is substantial and irreparable in damages. Neither of these conditions is shown here.

The judgment of the lower court is reversed, and the cause remanded with instructions to dismiss the action for want of equity.

RUDKIN, C. J., GOSE, and FULLERTON, JJ., concur.

MORRIS, J., took no part.

[No. 8007. Department One. June 3, 1909.]

LEWIS COUNTY, *Respondent*, v. JOHN W. McCUTCHEON
et al., *Appellants*.¹

EMINENT DOMAIN—DRAINS—STATUTES. Laws 1895, page 142, authorizes condemnation proceedings by a county to acquire a right of way for a drainage ditch completed under the unconstitutional act, Laws 1890, p. 652.

SAME—LIMITATIONS. Laws 1895, p. 270, limiting actions by municipal corporations to collect special assessments for any local improvement to ten years after delinquency of the assessment, applies to condemnation proceedings by a county to acquire a right of way for a drainage ditch, under Laws 1895, p. 142, constructed under a prior unconstitutional act; since such proceeding is a mere incident to the power to institute proceedings for the purpose of obtaining money to pay the costs incurred under the void act.

¹Reported in 101 Pac. 1083.

SAME—CONSTRUCTION OF DRAINS UNDER VOID ACT—LIMITATIONS. A proceeding by a county under Laws 1895, p. 142, to provide for the payment of expenses incurred in constructing a drainage ditch under the unconstitutional act of 1890, must be commenced within a reasonable time; and a delay of more than eleven years is unreasonable.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 24, 1908, upon findings in favor of the plaintiff, in an action to appropriate and condemn rights of way for a drainage ditch and to determine the compensation to be paid therefor. Reversed.

J. W. A. Nichols, for appellants.

U. E. Harmon, for respondent.

MORRIS, J.—In the year 1893, Lewis county constructed and completed, except the acquisition of rights of way, what is known as the Joel Stearns ditch. The work was done under the Laws of 1890, page 652, chapter 21, which act was held unconstitutional by this court in *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097. In 1895 an act providing for the payment of expenses incurred in compliance with the void act of 1890, being Laws of 1895, page 142, chapter 79, was passed by the legislature, declaring an emergency, which act was approved March 19, 1895. Under the latter act, this proceeding was commenced to acquire rights of way for said ditch, and to determine the amount of compensation, if any, to be paid. On March 27, 1908, these appellants appeared and filed their demurrer to the petition generally and upon the ground, among others stated, that the proceeding was barred by the statute of limitations. This demurrer was overruled, and the parties then entered into a stipulation, waiving a jury and agreeing that the amount, if any, to be determined as compensation, should be the sum fixed by the appraisers who acted in behalf of the county. The court thereupon entered its decree of condemnation for the lands,

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and fixed the compensation at the sum of \$171.90, and appellants, duly excepting, have appealed.

Appellants contend that the act of 1895 does not confer upon respondent the right of eminent domain under which it may condemn and appropriate lands for the ditch in question. This court has recognized or upheld the right to condemn land for ditches and drains under the act in question, in numerous cases. *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Skagit County v. McLean*, 20 Wash. 92, 54 Pac. 781; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; *Espy Estate v. Pacific County*, 40 Wash. 67, 82 Pac. 129; *State ex rel. Ames v. Lewis County*, 45 Wash. 423, 88 Pac. 760; *Lewis County v. McGeorge*, 47 Wash. 414, 92 Pac. 268. These cases are a sufficient answer to this contention.

The second contention of appellants is that proceedings under this act are barred by the statute of limitations providing for the commencement of actions for collection, or to enforce the lien of, any special assessment within ten years. Laws 1895, p. 270. This contention we are inclined to sustain, holding that the statute referred to applies, at least by analogy, to proceedings under this act of 1895. The right of eminent domain, in so far as it can be held to be granted under the act of 1895, is a mere incident to the power conferred to institute proceedings for the purpose of obtaining money with which to pay the cost and expenses incurred under and by virtue of the void act of 1890, and should be exercised within ten years as provided for in the act of 1895. *Frye v. Mount Vernon*, 42 Wash. 268, 84 Pac. 864. Even though we were inclined to hold that the limitation act of 1895 did not apply to proceedings under this act, it must be conceded that actions to obtain the benefit of such an act must be commenced within a reasonable time. As was said by this court, in *Olympia v. Knox*, 49 Wash. 537, 95 Pac. 1090, in passing upon the time in which a reassessment should be made, it is impossible to fix any definite rule; and courts

should hesitate to question the actions of municipalities in this respect in determining the time in which they shall act. But this cannot be carried to the extent of ignoring the rights of others. The time elapsing between the approval of the act of 1895 and the commencement of this proceeding was eleven years and eight months, an unreasonable time under any theory.

We conclude that the court was in error in overruling the demurrer, and the judgment is reversed and the cause remanded with instructions to dismiss the action.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 7321. Decided June 4, 1909.]

THE STATE OF WASHINGTON, *on the Relation of J. S. Whitehouse et al., Appellant*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*.¹

RAILROADS—REGULATION—SERVICE—OPERATION OF THROUGH TRAINS—CHARTER—MANDAMUS. The original charter of the Northern Pacific Railway Company, authorizing it to maintain and enjoy a "continuous railroad" between its terminals, does not require it to operate all its through passenger trains from terminus to terminus; but it maintains and enjoys a "continuous railroad" from terminus to terminus when it operates one passenger train daily each way directly between its terminals without change of cars or deviation, affording adequate service for all who desire to travel over its line; and mandamus will not issue to require it to do more.

SAME. It would be immaterial that its through trains were not run over the main line as originally laid out, where changes were made to reduce curves and grades, and the old line received an adequate local service.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered February 12, 1907, denying a writ

¹Reported in 102 Pac. 24.

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of mandamus to compel the operation of through passenger trains, after a trial on the merits before the court. Affirmed.

Boyle, Warburton, Quick & Brockway, for appellant.

B. S. Grosscup and W. C. Morrow, for respondent.

MOUNT, J.—The relators brought this action in the court below by writ of mandamus, to compel the Northern Pacific Railway Company to run all its through passenger trains directly into and out of the city of Tacoma, without deviating from the main line and without change of cars or transfer of passengers, mail, or express matter. Issues of fact were joined, and upon a trial the court denied the writ. The relators have appealed.

There is no substantial dispute in the facts. They are stated, we think, fairly in respondent's brief in substance as follows: By the act of July 2, 1864, Congress incorporated the Northern Pacific Railroad Company and authorized and empowered it:

"To lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line with the appurtenances, viz., beginning at a point on Lake Superior in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States on the line north of the 45th degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus." 13 Stats. at Large, 365.

Pursuant to this and other acts and joint resolutions, large bodies of land were granted in aid of the road, which was constructed from the eastern terminus at Ashland, Wisconsin, to Tacoma, on Puget Sound. As originally constructed it passed through the towns of Enumclaw, Buckley, South Prairie, and Orting. The Northern Pacific Railroad Company subsequently went into the hands of a receiver. The en-

tire property of the company was sold at mortgage sale in 1896, at which time the road was bought in by the Northern Pacific Railway Company, the present respondent, which has owned and operated the road ever since. The respondent, Northern Pacific Railway Company, was incorporated under the laws of the state of Wisconsin, by special act. Chapter 244 of the Laws of 1895. Prior to the mortgage sale, the Northern Pacific Railroad Company had operated from Meeker Junction to Seattle over the tracks of the Northern Pacific & Puget Sound Shore and the Columbia & Puget Sound. The Northern Pacific & Puget Sound Shore was constructed from Meeker Junction to Black River Junction. From Black River Junction it had the right to use the road-bed of the Columbia & Puget Sound to Seattle, together with the right to lay rails thereon and to operate trains thereover. The property of the Northern Pacific & Puget Sound Shore was acquired by respondent at the time it acquired the property of the Northern Pacific Railroad Company; so that the line from Meeker Junction to Seattle became a part of this respondent's lines and property at the time of the foreclosure sale in 1896.

About the year 1900 this respondent completed what is known as the Palmer cut-off, a branch line leaving the old main line at Palmer Junction and running in a westerly direction to the town of Auburn, which is located on the line between the cities of Tacoma and Seattle. This cut-off reduced the distance from Palmer Junction to Tacoma by way of Auburn about three miles over the original line known as the Buckley line passing through the towns of Enumclaw, Buckley, South Prairie, and Orting, before mentioned. By reason of the superiority of the Palmer cut-off over the Buckley line, with respect to relative curves and grades, the through trains of the respondent were thereafter run over the cut-off. The old Northern Pacific Railroad Company furnished but one through train a day each way. At the time of and prior to the hearing of this case, the respondent was

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operating two solid trains each way daily between St. Paul, Minnesota, and Puget Sound, being known as trains Nos. 1 and 2, commonly known as the North Coast Limited, and trains Nos. 3 and 4, commonly known as the Pacific and Twin City Express. It was also operating a third train, Nos. 5 and 6, commonly known as the Burlington train, which ran between St. Paul, Minnesota, and Seattle, Washington, but required a change of cars at Billings, Montana, where connections were made with the solid through Burlington train between Kansas City and Seattle. Train No. 1, being westbound, left the old line at Palmer Junction and ran over the cut-off to Auburn, thence to Seattle, and thence over the same line to Auburn, and on to Tacoma and Portland, Oregon; while train No. 2, being eastbound, ran from Portland to Tacoma, thence through Auburn to Seattle, thence back again to Auburn, thence by way of the cut-off to the east, the city of Tacoma being given, as auxiliary to the solid train above mentioned, a stub train to Auburn for the accommodation of persons not wishing to take the through train at Tacoma. Number 3, being westbound, ran from Auburn directly to Tacoma and Portland. Train No. 4, being eastbound, ran from Tacoma to Auburn, and thence east over the Palmer cut-off but without running into Seattle, the latter city being served by a stub connection from Auburn with trains Nos. 3 and 4. Trains Nos. 5 and 6 ran directly to and from Seattle.

At the time of the trial, there were three regular through passenger trains operated by respondent. One originated and terminated at Tacoma, the second originated and terminated at Seattle, and the other, a solid train, through both the above cities on its way between Portland, Oregon, and St. Paul, Minnesota. The North Coast Limited train is limited as to stopping places and also as to the number of cars in the train. Physical conditions and limited time prohibit more than nine cars between St. Paul and Seattle. It carries an observation car, is lighted by electricity, and makes bet-

ter time than the other trains. This train westbound runs over the Palmer cut-off to Auburn, at which place it is met by a stub train upon which passengers bound for Tacoma may, if they so elect, come on directly to their destination, or they may remain on the train, arriving at Tacoma about four hours later. The Tacoma mail is brought directly on the stub from Auburn to Tacoma. Train No. 1 proceeds as a solid train to Seattle, a distance of twenty-one miles, arriving there at 9:30 p. m. This train leaves Seattle for Tacoma and Portland at 10:20 p. m., arriving at Tacoma at 11:50 p. m., departing for Portland at 12:05 a. m., and arriving at the latter city at 7 a. m. This train between Seattle and Portland loses its limited character in that it takes on extra sleeping cars at Seattle and Tacoma, drops off the observation car, makes many local stops, and runs at a comparatively slow rate. Eastbound this train is known as No. 2. It leaves Portland at 2 o'clock p. m., arrives at Tacoma at 7:20 p. m., leaves Tacoma at 7:35 p. m., and, passing through Auburn arrives at Seattle at about 9:30 p. m.; leaving there almost immediately for the east, it returns to Auburn, going east over the Palmer cut-off. Tacoma passengers may take this train as it passes through Tacoma, or at their option may take the Puget Sound Limited, leaving Tacoma for Seattle at 9:40 p. m., making immediate connection at Auburn with No. 2. Trains Nos. 1 and 2 were installed about the time the Palmer cut-off was constructed, and have been operated in the manner they are now operated since the cut-off was completed.

It appears, that this North Coast Limited train was put on to meet the active competition of the Great Northern and Canadian Pacific companies; that Seattle is a competitive point, and furnishes the bulk of the business for this train—more than is furnished by Tacoma and all points south, including Portland; that the train consists of an observation car, one standard sleeping car, one tourist sleeping car, a dining car, a first-class day coach, a second-class day coach, and

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mail, express and baggage cars; that the apparatus for furnishing the electric light is carried in the baggage car; that in order to divide this train at Auburn, sending one part to Seattle and another part to Tacoma, it would be necessary to add at least three coaches to the train, besides an extra baggage car, which would so enlarge the train that it would render it impossible for it to run fast enough to compete with the other roads for the business, and that if such an order were made it would be necessary for respondent to discontinue this train entirely.

It appears that Seattle furnishes almost exactly three times as much passenger business to respondent as does Tacoma, and in point of population the former city is more than one-half as large again. For the last three years the total volume of business in Seattle is more than twice the volume in Tacoma. The North Coast Limited is a very expensive train to operate by reason of the superior character of the equipment, the limitation as to the number of passengers it can accommodate, the increased speed at which it travels, and the resulting detention imposed upon the other trains; that without the passenger business furnished by Seattle it would not be possible for respondent to maintain this fast limited train, and that in order to get this competitive business it is absolutely necessary to run into Seattle as a solid train; that under these methods of operation, the time from St. Paul to Tacoma made by this train is over four hours less than the time made by No. 3; that by reason of operating this train so as to secure the great amount of passenger business originating and terminating at Seattle, the citizens of Tacoma are given a superior through service to St. Paul, which is over four hours shorter than can be made by a regular through train operated in the ordinary manner.

It also appears that under the present arrangement the city of Tacoma is furnished adequate and reasonable service by respondent. It also appears that the Buckley line is

a line of excessive grades and curves, the grades being as high as one and eight-tenths, with ten degree curves. The line has also numerous reverse curves. It is difficult to maintain it by reason of mountain streams, and it is in many respects greatly inferior to the Palmer cut-off. The distance to Tacoma is three miles greater by the Buckley line than by the cut-off. It is also shown that the Buckley line cannot be improved so as to render it equal to the cut-off line within any reasonable expense. The Buckley line has not been abandoned, but is now served by two local trains daily each way.

Voluminous briefs and arguments have been filed in the case, and many points argued, but the main contention of the appellant is that, under the provisions of the original charter to the effect that respondent "is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a *continuous railroad*" from Lake Superior to Puget Sound, the railroad company must run *all* its regular through passenger trains, and particularly the North Coast Limited trains, directly into and out of the city of Tacoma, the western terminus of the road. Appellants do not contend that there is any statute which specifically requires the railway company to operate all its trains directly from the eastern terminus of the road to the western terminus without deviation, but they contend that the charter provision above quoted which authorizes the railway company to construct and maintain a *continuous railroad*, requires all through trains operated over such road to be run directly from one terminus to the other. They cite no cases directly in point upon this question, but they rely upon the case of *Union Pacific Railroad Company v. Hall*, 91 U. S. 343, 23 L. Ed. 428. That was a case where the charter required that "the whole line of the railroad . . . shall be operated and used for all purposes of communication, travel, and transportation so far as the public and government are concerned as one connected, continuous line," and

where the railroad company was not using the road as a continuous line, but had constructed a bridge across the Missouri river between Council Bluffs and Omaha, which bridge was not used as a part of the continuous line of the Union Pacific Railroad Company, but was operated by another company composed of its own employees, by the use of transfer trains, and special rates were charged therefor. None of the trains of the railroad company crossed this bridge. The supreme court of the United States held in that case that the railroad company was bound to operate and run the whole road, including the bridge, as one connected, continuous line. In that case it appears that the court required the railroad company to run all its trains over the bridge, but the point that all through passenger trains must run direct from terminus to terminus without deviation or change was neither considered nor decided in that case.

That case cannot control this, for it cannot be maintained in this case that the Northern Pacific Railway is not operated as a continuous line from terminus to terminus. It is conceded that at least one train daily leaves Tacoma for St. Paul and *vice versa*, and runs directly through without change of cars or deviation from the main line; and it is established if not conceded that this train, with the accommodation afforded by the other two, furnishes adequate service for all who desire to travel over the line. It necessarily follows from this that the road is furnished, maintained, and enjoyed as a *continuous railroad* from terminus to terminus.

"A writ of mandamus to compel a railroad company [corporation] to do a particular act . . . in running its trains can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty." *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092.

There is no statute or common law duty which requires the respondent to do more than maintain a continuous line

of railroad between Lake Superior and Tacoma. This is required by the charter of the company, as above stated. When the railway company maintains one direct through train daily each way, which train furnishes adequate and reasonable service, its legal duty is fully met, and a writ of mandamus will not issue to require it to do more. The facts that other trains with better equipment are operated over the line and run faster, or make side trips on branch lines, or make local stations only between points on the main line, are clearly all matters of operating detail which, if not regulated by law, must be regulated and controlled by the company itself.

From the showing made we are satisfied that the respondent was justified in running its through train by way of Auburn. The road as originally constructed has not been abandoned. Two regular local trains each day are run over that line, affording adequate facilities to points thereon. It certainly cannot be held that the road must always be maintained and operated exactly in the same place it was first built. It must naturally be repaired, curves and grades must be reduced, and changes made to meet the growing demands of commerce and competition. This is what appears to have been done.

We find no merit in the appeal. The judgment must therefore be affirmed.

RUDKIN, C. J., CROW, DUNBAR, and FULLERTON, JJ., concur.

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[No. 7640. Decided June 4, 1909.]

M. H. CUSHING, *Appellant*, v. MAY N. HEUSTON, *Defendant*,
JESSIE M. ELLIOTT *et al.*, *Interveners and Respondents*.¹

TRUSTS—TRUSTEE EX MALEFICIO — VERBAL PROMISE — EVIDENCE—SUFFICIENCY. A trust *ex maleficio* does not arise from a mere verbal promise by the purchaser of one of several lots to attend to the matter of acquiring the title to abutting tide lands for the benefit of the purchasers of other lots in the same block, made at the same time, where the parties were entire strangers, the promisor had no funds or property in his hands belonging to the others and none was furnished and he did not agree to advance any for the contemplated purchase, and he was not to receive any compensation for the volunteered service, and in acquiring a deed for himself, the grantors of the tide lands were not concerned as to what parties were to be benefited by the purchase; notwithstanding representations that the purchaser was acting for the benefit of himself and neighbors.

APPEAL—REVIEW—FINDINGS. In an equity case tried *de novo* on appeal, the supreme court is not bound by the findings of the trial court.

TRUSTS—IMPLIED TRUSTS—EVIDENCE—SUFFICIENCY. An implied trust upon the holder of a legal title to land should not be found on conflicting parol testimony, if there is left any ground of doubt in regard to it.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 7, 1908, upon findings in favor of the interveners, after a trial on the merits before the court without a jury, in an action for specific performance. Reversed.

Larrabee & Wright and *George C. Congdon*, for appellant.

Harrison Bostwick, for interveners and respondents.

PARKER, J.—This is a suit for specific performance, seeking to compel conveyance of certain tide land. The real controversy is between the plaintiff and the interveners, both of whom claim the right to a conveyance from the de-

¹Reported in 102 Pac. 29.

pendant, who is willing to convey to such persons as the court may direct. The material facts are as follows: On about March 1, 1905, the intervener Jessie M. Elliott, Mrs. Ellen Fish, and Mrs. Vine Burrington became the owners of lots 18, 19, 20, and 21, and the plaintiff became the owner of lots 24 and 25, all in block 2, Chilberg's Addition to West Seattle, all of which lots front upon the tide land involved in this action. The lots were acquired by the respective parties at the same time, by contract with W. W. McGuire, agent of the then owner.

At the time of the lot purchase, some conversation took place between these parties and McGuire, which the trial court construed to be a verbal contract by which the parties were to purchase the tide land in front of their lots at a dollar and a quarter per front foot, and also by which Cushing was to act as the agent of the other parties in looking after and consummating the purchase of the tide lands by and through McGuire, as agent of the defendants B. F. Heuston and wife, the owners of the tide land. The correctness of the finding of the trial court upon this question is challenged by the plaintiff, which we will notice later, and review the evidence upon which it is based. At this time no money was paid upon the proposed tide land purchased by any one, nor was any money furnished Cushing by any one to be paid by him thereon, nor was there any promise by him, or agreement by which he was to advance the money necessary to bind or consummate the proposed tide land purchase, nor was there any agreement to pay him for such service. Cushing did not go to the office of McGuire to consummate the tide land purchase, as it is claimed he agreed to do under the alleged agency contract, but some days thereafter, on March 4, 1905, he went to the owners of the tide land, Heuston and wife, at Tacoma, and purchased directly from them, in his own name, all of the tide land in front of lots 18 to 25, inclusive, paying \$50 from his

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own funds upon the purchase price, which purchase was then evidenced by the following writing:

"March 4th, 1905.

"Received of M. H. Cushing, \$50 dollars, part payment for tide lands in front of Lots 18 to 25 inclusive, Block 2, Chilberg's addition to West Seattle, King County, Washington, this day sold him for \$218.75; balance \$168.75 payable on or before one year with interest at 6% per annum. Special warranty deed on full payment.

"(Signed) B. F. Heuston."

This was executed by Heuston in behalf of himself and wife, who consented to and ratified it. The court found that Heuston made this sale with the understanding that Cushing was purchasing the land for the benefit of himself and his neighbors, Jessie M. Elliott and others, who were the upland owners. As to the correctness of this finding and as to what inducements other than the purchase price caused the Heustons to sell to Cushing, we will notice later. The interveners, by assignments and conveyances, made before the commencement of this action, became interested as follows: Gaffner and wife owned lots 18 and 19, Jessie M. Elliott owned lots 20 and 21, and Hoadley and wife owned lots 22 and 23, while Cushing, the plaintiff, owned lots 24 and 25, as originally purchased by him. Thereafter, in November, 1905, the interveners tendered to Cushing such portion of the \$50 as had been paid by him to the Heustons upon the tide land claimed by them, which tender was refused. This is the only tender ever made to Cushing.

On March 1, 1906, Cushing tendered to the Heustons the remaining principal and interest due upon the tide land contract, and demanded a deed in compliance with its terms, all of which was refused. Thereafter this action was commenced by Cushing, against Heuston and wife, to enforce specific performance of the contract, and thereafter the interveners filed their complaint in intervention, praying that deeds be made to them for the tide land in front of their lots. Thereafter, before trial, the defendant B. F. Heuston

died, when his wife, the defendant, became executrix of his last will and testament. No effort was made at the trial, by Hoadley and wife to establish their claims, which were treated as abandoned. The trial court disposed of the cause by decreeing that the defendant May N. Heuston, individually and as executrix, upon payment to her of the balance of the purchase price, should deed the tide land as follows: To the interveners Gaffner and wife, the tide land in front of their lots 18 and 19; to the intervenor Jessie M. Elliott, the tide land in front of her lots 20 and 21, and to the plaintiff Cushing, the tide land in front of his and Hoadley's lots 22, 23, 24, and 25. Thereupon the plaintiff appealed to this court, where he now contends that he is entitled to have all the tide land deeded to him by defendant, upon his paying the balance of the purchase price as agreed in the contract of purchase. The decree was rendered in favor of the interveners Elliott and Gaffners as to the tide land in front of their lots, and it is now sought to be supported, upon the theory that the purchase of the tide land by Cushing in his own name, in view of his relation to and agreement with the interveners and defendants, raised a constructive trust in favor of the interveners.

In order to correctly apply the doctrine of equity relating to such trusts, in the determination of this question, we find it necessary to go beyond the findings of the trial court touching the relations of Jessie M. Elliott and her associates with Cushing, and the inducement which led the Heustons to sell to Cushing, and look into the evidence, to the end that we may see the real relation of the parties to each other more in detail and with greater certainty than is expressed in the findings of the trial court, which are general in their nature, and to the effect that Cushing was acting as agent for the others, and that he induced the Heustons to sell to him by fraudulent representations.

It appears from the evidence that, until the time of the purchase of the lots, about March 1, 1905, Jessie M. Elliott

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and her associates had never met the plaintiff Cushing, being then entire strangers to him. Their coming together there resulted evidently in a common desire to purchase lots in the addition, and all being in conversation with Mr. McGuire, the agent, and the purchase of their respective lots being consummated, then occurred all of the conversation which the trial court construed as an agency agreement on the part of Cushing, to purchase the tide land for himself and the other lot owners.

As to this alleged agreement, Jessie M. Elliott was the principal witness, and testified as follows:

"A. Mr. McGuire assured us we could have the tide lands abutting our upland. Q. What was said at that time, if anything, Mrs. Elliott, when you purchased these lands of Mr. McGuire—the uplands—regarding the tide lands? A. Why, Mr. McGuire, Mrs. Burrington and myself were standing there together, and others, and Mr. Cushing at his own proposal—his own suggestion—suggested that he attend to the tide lands for the ladies. There were only three ladies that bought tide lands with him, adjoining him, and we agreed to it, and he was to go to McGuire's office the next morning and secure these tide lands for us instead of our going and bothering about it. Q. You relied upon that? A. We relied upon it assuredly. We fully understood it that he was to purchase these tide lands for us jointly. Q. Did you know at that time what you were to purchase them for? A. Yes, sir; for a dollar and a quarter a front foot. Q. Who offered them for a dollar and a quarter? A. Mr. McGuire offered us. He told us at the time that they could be bought of Mr. Heuston in Tacoma. Q. Why didn't you buy your tide lands of Mr. McGuire? A. Well, simply because Mr. Cushing offered to attend to this for us. We were very glad to have some one attend to it for us, and we all agreed by answering we would be very glad to have him attend to it."

Mr. McGuire, the agent, corroborates Mrs. Elliott in a very general way, giving but few of the details of the conversation touching Cushing's agency. He says:

"They said they wanted the tide land if they took the upland lots, and I assured them they could have the tide lands.

So they finally delegated Mr. Cushing to see me the next morning at ten o'clock at my office and arrange for the purchase of the tide lands. Mrs. Elliott did the talking. After talking to the other ladies, and asking them if it was satisfactory for Mr. Cushing to attend to it for them. . . . They were to buy them on contract, so much down and the balance in a year. . . . Mrs. Elliott says: 'I am very busy, and you go attend to it without all of us being there.'"

Touching this conversation and the alleged agreement, Mr. Cushing, the plaintiff, testifies:

"Q. Was there ever such an agreement entered into, Mr. Cushing? A. None whatever. Q. Now, Mr. Cushing, were you authorized—were you delegated as the agent of Mrs. Fish and Mrs. Burrington and Mrs. Elliott to purchase any tide land lots? A. None whatever, at no time. Q. Was anything said there about you looking after the purchase? A. Nothing whatever. Q. Now, you heard Mr. McGuire's evidence in regard that he told you who was the owner. Did you hear that? A. Yes, I understood him to say he told me, which is not so. I knew nothing about who owned the property at that time. Q. How did you find it out? A. I explained to Dr. Saury that I was to be a neighbor of his over there and that I had bought certain lots. He says, 'Did you get the tide land?' and I says, 'No,' and he says, 'You better get the tide lands, because the meander line is close up to the bank,' and I asked him who owned it, and he says Mr. Heuston of Tacoma, he thought owned that in there. . . . Then I looked up the records and I found out Mr. Heuston owned some tide land in there."

Mrs. Ellen Fish, one of Mrs. Elliott's original associates, touching this alleged agreement for the purchase of the tide land, testified:

"Q. Do you remember if there was any agreement made there between yourself and all the parties that I have mentioned whereby Cushing was appointed your agent? A. No, sir. Q. Was there anything said about the tide lands, the purchase of the tide lands? A. Nothing whatever that I remember. Q. By the way, are you acquainted with Mr. McGuire? A. Yes, sir. Q. Well, did you ever speak to him in any way that you were anxious to secure the tide lands in

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front of your lots? A. No, sir, we were not wanting the tide lands; had no idea of getting the tide lands."

Mrs. Vine Burrington, one of Mrs. Elliott's original associates, touching this same matter, testified as follows:

"Q. Was there anything said at all about securing the tide lands? A. Not that I know of; not to my knowledge. Q. Did you ever attempt to secure the tide lands there? A. No, sir, I never did. Q. Did you want the tide lands? A. No, I didn't want them. Q. Did you ever offer any price for the tide lands? A. I never did."

Touching the matter of the inducements, if any, other than the money consideration, which led the defendants Heuston and wife to sell the tide lands to Cushing, we have the testimony of Mrs. Heuston as to the conversation which took place between Cushing and her husband at the time, she being present, as follows:

"Mr. Cushing said that he and some neighbors had bought some upland adjoining the tide land, which they understood Mr. Heuston owned, and he had come over to see what he could do to purchase said tide land for himself and his neighbors."

This conversation evidently occurred on March 4, 1905, the date of the purchase. We find no competent evidence in the record showing any other or different representations made by Cushing to the Heustons, nor is there any competent evidence in the record indicating that such representation, as to whom Cushing was purchasing for, induced the Heustons to make the sale.

Passing for the present the matter of conflict of testimony, and viewing the relationship of the parties in the most favorable light for the interveners as testified to by Mrs. Elliott, it at once becomes plain that whatever trust arose in favor of the interveners upon the purchase of the tide lands by Cushing, it falls within that class of constructive trusts designated "*trusts ex maleficio*," for in this case the alleged trust was not evidenced by any writing, nor was any money

or property of the persons claiming to be beneficiaries used by Cushing in the purchase of the tide lands, nor did he agree to loan or advance funds therefor. The trust must be constructed, if at all, from the relationship of the parties and the manner of acquiring the tide land from the Heustons. And, unless we can find some element of fraud or bad faith on the part of Cushing, by which he violated some duty recognized in law or equity, as owing to Mrs. Eliott and her associates and to the Heustons, no trust was created. In 3 Pomeroy's Eq. Jur. (3d ed.), § 1056, it is stated:

"In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute."

Along the same lines, in 1 Perry on Trusts (5th ed.), § 134, it is stated:

"A trust results from the acts, and not from the agreements, of the parties, or rather from the acts accompanied by the agreements; but no trust can be set up by mere parol agreements, or, as has been said, no trust results merely from the breach of a parol contract; as if one agrees to purchase land and give another an interest in it, and he purchases and pays his own money, and takes the title in his own name, no trust can result."

Beach on Trusts & Trustees, vol. 1, § 219, is to the same effect. With these general principles before us, we are to inquire what legal or equitable duty of Cushing, owing to the interveners or defendants, was violated by him. We have seen he was an entire stranger to the parties. He was not bound by any writing. No duty was imposed upon him by having any funds or property in his hands belonging to the interveners; nor did he agree to advance or loan money for

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the tide land purchase; nor was it contemplated that he was to have any compensation from the interveners for his services. The testimony of the intervener Jessie M. Elliott leaves no doubt as to these matters. In the light of these facts, it is difficult indeed to conceive of any duty resting upon him which can be recognized in law or equity as being violated by the course he took. If it be suggested that, by Cushing's promise as interpreted by Mrs. Elliott, the interveners were induced to let the purchase of the tide land rest with him, when they otherwise might have purchased it directly themselves, the answer is found in the fact (taking Mrs. Elliott's version), that she and her associates furnished no money or means for consummating the purchase; that McGuire then present was agent for the sale of the tide lands, as well as the lots, and she and her associates could have dealt directly with him had they so desired; that he told them who the owner of the tide land was, and that whatever service Cushing agreed to render was to be voluntary and without consideration. We do not think this was such an agreement, though it be all that Mrs. Elliott claims, as in law or equity obligated Cushing to do anything.

In discussing a case where the facts were such that it might be argued the persons claiming to be beneficiaries were prevented from purchasing, by the promise of their supposed agent, the Court of Appeals of New York, in *Wheeler v. Reynolds*, 66 N. Y. 227, 234, said:

"There was as much ground for saying there as here that the plaintiff relied upon the agreement, so far that he did not himself bid or make arrangements with other parties for bidding, and yet it was held that it was not a case for the enforcement of the agreement either upon the ground of part performance or of a parol trust repudiated by the trustee in wrong of the plaintiff. If one employs another by parol to buy land for him with his own money, and the latter buys the land and takes the deed to himself and refuses the former any right therein, the former cannot compel a conveyance to him, even by showing that but for his reliance

upon the fidelity of his agent he would have purchased in person or through some other agent."

In the case of *Lehman v. Lewis*, 62 Ala. 129, 133, discussing a similar situation and quoting approvingly from one of its earlier decisions, the rule is stated in this language:

"Where a man employs another person by parol, as an agent, to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase-money is paid by the principal, then, if the agent denies the trust, and there is no written agreement or document establishing it, he cannot, by a suit in equity, compel the agent to convey the estate to him; for (as has been said) that would be decidedly in the teeth of the statute of frauds."

These views are in harmony with the following authorities, to which many might be added: 15 Am. & Eng. Ency. Law (2d ed.), 1187; *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Hunt v. Roberts*, 40 Me. 187; *Bland v. Talley*, 50 Ark. 71, 6 S. W. 234; *Appeal of McCall* (Pa.), 11 Atl. 206; *Kraft v. Smith*, 117 Pa. St. 183, 11 Atl. 370; *Morton v. Nelson* (Ill.), 31 N. E. 168; *Bailey v. Hemenway*, 147 Mass. 326, 17 N. E. 645; *Hoffman v. Bloomsburg etc. R. Co.*, 143 Pa. St. 503, 22 Atl. 823; *Taylor v. Kelley*, 103 Cal. 178, 37 Pac. 216.

The principal authority cited by counsel for interveners, and probably the strongest case to be found in support of their contention that the trust arose by virtue of Cushing's alleged agency, is that of *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145. If that decision be regarded applicable to the facts of this case, then we think it must also be regarded as opposed to the great weight of authority in this country. There were, however, in that case circumstances which rendered it distinguishable from this. In that case the agents were employed to negotiate for the purchase of certain property, the asking price of which was unknown. They were general real estate agents, engaged in the business. They were to be paid for their services, as they

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had previously been employed and paid by their principal to purchase other property for him. While this relation existed with their principal, they purchased the property with their own funds and took title in themselves, which the court held was in trust for their principal.

In view of the willingness of Mrs. Heuston, the defendant, to convey this tide land to whichever of the parties the court finds entitled thereto, it seems of little consequence as to what representations were made by Cushing at the time he purchased the same from the Heustons. But in any event, were there fraudulent representations made to the Heustons which induced them to sell to Cushing, or were they moved so to do by the purchase price alone? In this connection we regard the vital question to be, not the representations which Cushing made as to his purpose in purchasing, but how were the Heustons influenced thereby. Would they have refused to sell in the absence of such representations? We find no competent evidence in the record that Cushing informed the Heustons of the names of any of his neighbors for whom it is claimed he was purchasing; nor do we find any competent evidence in the record showing that it was of any consequence to the Heustons as to whom Cushing was purchasing for; and the fact that the written evidence of the purchase was then made by the Heustons in Cushing's name negatives any such concern on their part. No representations, whatever their nature, can work fraud or deceit upon a party when they relate to a matter which does not concern him, and when he is not moved to act thereby. We cannot presume that the Heustons were induced to sell the tide land to Cushing by any other consideration than the purchase price named in the written evidence of sale; and since it does not affirmatively appear that the representations were the inducements for the Heustons making the sale, Cushing did not thereby become a trustee *ex maleficio*. *Dilts v. Stewart* (Pa.), 1 Atl. 587; 3 Pomeroy's Eq. Jur. (3d ed.), § 1056. The case of *Kelly v. Central Pac. R. Co.*, 74 Cal. 557, 16 Pac. 386, 5 Am. St.

470, cited by counsel for interveners, is not in point, for as pointed out by the court in that case, the false and fraudulent representations were the inducing cause of the contract.

So far, it will be observed, our discussion of the relative rights of the parties has been upon the assumption that there was an understanding between Cushing and the other lot owners by which he was to purchase the tide land for them, such as was testified to by Mrs. Elliott. Turning now to the question of fact as to whether or not any such understanding or agreement ever existed, we find ourselves, in the light of the evidence above quoted (which is substantially all there was upon that question), unable to arrive at the ultimate facts, as found by the learned trial court, with that degree of certainty required by well settled rules of equity in order to construct a trust *ex maleficio* out of the acts of the parties. We are not unmindful of the general rule that appellate courts are slow to disturb findings made by juries and trial courts on questions of fact; but this is a pure suit in equity, brought to this court with all of the evidence and findings thereon made by the trial court, with exceptions to such findings. Hence, it falls within that class of cases which we are required to examine *de novo*. Bal. Code, § 6520 (P. C. § 1068). Referring to the force and effect of findings made by the lower court, this court said, in *In re Garfinkle*, 37 Wash. 650, 654, 80 Pac. 188:

"The same rule does not obtain in passing upon the findings of the court as does upon the verdict of a jury. In the latter case the court is bound by the verdict of a jury on questions of fact, while in the former, though the findings of the court are more or less advisory, . . . yet such findings are not conclusive on the appellate court, which will look at the testimony to see if the findings are justified."

See, also, *Roberts v. Washington Nat. Bank*, 11 Wash. 550, 40 Pac. 225; *Cleveland v. Glover*, 13 Wash 131, 42 Pac. 538; *Allen v. Swerdfeger*, 14 Wash. 461, 44 Pac. 894.

The claims of the interveners here must be substantiated by

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something more than a mere preponderance of the evidence. As stated in 1 Beach on Trusts and Trustees, § 112:

“The rule is well established that, in order to impress an implied trust upon the holder of a legal title to real estate by parol testimony, it must be of such a character as to leave the court without any ground for doubt in regard to it. Where this characteristic is absent or the agreement comes within the provisions of the statute of frauds, it will be held unenforcible and void.”

Tested by this rule, we think the evidence does not warrant the holding of the learned trial court that Cushing acquired the interest in the tide lands by his contract of purchase from the Heustons, in trust for the interveners.

We conclude that the decree of the superior court should be reversed, in so far as it directs deeds to be made by defendant May N. Heuston, as executrix and individually, to the interveners Jessie M. Elliott and Charles H. Gaffner, for the tide land in front of their lots 19, 20, 21, and 22; and that the plaintiff M. H. Cushing is entitled to a decree of specific performance in this action requiring the defendant as executrix and individually to deed to him said tide lands, in compliance with the contract of purchase therefor, made March 4, 1905, upon his paying the balance of the purchase price with interest to the date of his tender on March 1, 1906. It is so ordered, and the superior court is directed to enter a decree accordingly.

The plaintiff and appellant will recover in this court his taxable costs upon this appeal, against the interveners and respondents Jessie M. Elliott and Charles F. Gaffner and Reba Gaffner, his wife, since the controversy here has been between no other parties.

FULLERTON, CROW, MOUNT, DUNBAR, MORRIS, and GOSE, JJ., concur.

[No. 8003. Department One. June 4, 1909.]

EDWIN P. FRINK *et al.*, *Appellants*, v. CARLETON GILBERT,
Respondent.¹

BROKERS—COMMISSIONS—SEVERAL BROKERS—EFFICIENT CAUSE OF SALE. Brokers are not entitled to commissions on a sale to a customer originally found by them, but who was unable to meet the terms, where, after negotiations had ceased and the matter was abandoned, another agent, with whom the property had also been listed, took up the matter independently and induced the customer to make the purchase, being enabled to do so by the help of friends who came to his assistance; since, of several brokers, the one whose effort was the efficient cause of the sale is entitled to recover the commissions.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 29, 1908, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to recover a broker's commission. Affirmed.

Jay C. Allen, for appellants.

McClure & McClure, for respondent.

CHADWICK, J.—Prior to April 9, 1908, the defendant was the owner of a certain lodging house and family hotel in Seattle, Washington, known as the "Stetson," and was desirous of selling it. Prior to that time he had entered into an oral contract with the plaintiffs to sell his furniture, fixtures, and leasehold interest for the sum of \$13,000, and agreed to pay them a commission of five per cent. The purchase price was to be paid \$5,000 cash, a mortgage of \$2,400 to be assumed, and \$5,600 to be secured, or real estate in either Seattle or Portland, Oregon, would be taken in exchange. Plaintiffs advertised this and other property in Seattle and Portland papers. The advertisement fell under the notice of one W. F. Muehe at Portland, who, after some correspondence,

¹Reported in 101 Pac. 1088.

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came to Seattle and called upon plaintiffs, who showed him several hotel properties, including the Stetson. Muehe and the defendant, in presence of the plaintiff Edwin P. Frink, after looking over the Stetson, engaged in conversation about prices and terms. Defendant stated the terms, as we have hereinbefore set them out. Muehe was willing and able to pay the \$5,000 cash, and agreed to assume the \$2,400 mortgage, but was unable to either pay or offer security for the remainder of the purchase price within the terms made and insisted upon by defendant. He then offered to secure the balance by a second mortgage on the furniture and fixtures. This was refused by defendant. This offer Muehe says he does not remember, but we are assuming that it is so. He says, in excuse of his failure to remember the alleged offer of a second mortgage, that he was not at that time seriously considering the Stetson, because plaintiffs were trying to sell him the Knickerbocker, a property of like character in which he felt a greater interest. Plaintiff Edwin P. Frink says that there was some further conversation about the possibility of Mr. Muehe's brother in Portland furnishing security for him. In the conversation defendant announced his intention of going to Portland. Frink then said to him, "You go to Portland. If you don't sell your hotel in Portland by the time you get back, Mr. Muehe will be still in the city, and we will be glad to take the matter up with you at that time. Mr. Muehe possibly can arrange his cash, by the time you return, to take this."

From that time on Muehe did not come in contact with plaintiffs with reference to the Stetson or any of the properties which he had looked over with them. Contrary to his announced intention to return to Portland the first of the following week, he returned on Saturday night. On Sunday evening Mrs. Corinne Simpson, a real estate agent in Seattle, called at the home of one J. L. Ford. It is not disclosed that either Ford or Mrs. Simpson knew anything of the negotiations between Muehe and plaintiffs. In casual conversation

it was suggested by the Fords, that they had friends, Mr. and Mrs. Muehe, from Portland, who were visiting in Seattle; that they were there to buy a hotel, and they would be glad to have Mrs. Simpson meet them. Accordingly they called up the hotel where they had registered, and were told that the Muehes had returned to Portland. Mrs. Simpson was asked what she had to offer that was a good buy, and she said she had the Stetson. She talked it over with the Fords, and upon their advice, she communicated with Muehe by telephone, advising him that it was Mr. Ford's desire that he return at once and look over the Stetson. Muehe then told her that he knew all about the Stetson, but that he could not handle it; that he could not furnish the securities that Mr. Gilbert insisted upon.

On the next day another conversation was had, in which Muehe still insisted that he could not take the property. Mrs. Simpson then told him, that the security would be arranged by Mr. Ford; that he insisted upon it. He at first refused to allow his friend to furnish this security, but finally consented. Mr. Ford then put up \$1,000 cash, which was turned over to defendant to bind the bargain, and finally put up the whole difference in money rather than incumber his property. A slight reduction was made because of the cash payment. The property was then made over by defendant to Muehe. Plaintiffs brought this action to recover a commission on the sale. Judgment was rendered in the court below in favor of defendant, and plaintiffs have appealed.

It is a fundamental proposition that a real estate agent, who produces a customer who is ready, willing, and able to buy, is entitled to his commission, although the vendor takes the matter in his own hands and sells to another. This rule has been frequently announced by this court. *Barnes v. German Savings & Loan Society*, 21 Wash. 448, 58 Pac. 569; *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264. But in the case at bar it must be borne in mind that, while ap-

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pellants had introduced Mr. Muehe to respondent, the property was at the same time listed for sale with Mrs. Simpson, who had an equal right to find a customer. As expressed by respondent, "The man who gets the money here first is the man who gets the property." It is true that, prior to closing the sale, Mrs. Simpson knew of the intervention of appellants; but it is not made to appear that the ethics of the real estate business demanded of her a cessation of her effort to sell the property. She was the first to procure a customer who met all the requirements of readiness, willingness, and ability. This she accomplished through the generosity of Mr. and Mrs. Ford. Appellants had introduced Muehe as a prospective customer. He was ready and willing, but he was not able to buy on the terms proposed. His attitude toward the deal was such that the court below was warranted in finding that the sale would not have been accomplished by appellants or on the terms proposed by them. Mr. Muehe says, "Well, the facts were these, that Mr. Ford offered to go my security—made it possible for me to buy the Stetson."

Where several brokers have the same property listed for sale, although each has contributed towards the result, the one whose effort was the efficient cause of the sale is entitled to recover the commission. The leading case upon this subject, and one most frequently cited and relied upon by the courts, is that of *Vreeland v. Vetterlein*, 33 N. J. 247, wherein the court said:

"Where the property is openly put in the hands of more than one broker, each of such agents is aware that he is subject to the arts and chances of competition. If he finds a person who is likely to buy, and quits him without having effected a sale, he is aware that he runs the risk of such person falling under the influence of his competitor—and in such case he may lose his labor. This is a part of the inevitable risk of the business he has undertaken. . . . Now in this competition, the vendor of the property is to remain neutral; he is interested only in the result. But when either of the agents thus employed brings a purchaser to him, and a bargain is struck at the required price, on what ground can he

refuse to complete the bargain? Can he say to the successful competitor, this purchaser was first approached by your rival, and you should have refused to treat with him on the subject? There is no legal principle upon which such a position could rest. . . . And if, therefore, it should be known to the vendor of the property that the agent, who introduces a purchaser to him has, by the usual arts of competition, taken such purchaser out of the hands of his rival, I am not aware of anything in the law which would justify such vendor in a refusal to complete the contract. . . . In the absence of all collusion on the part of the vendor, the agent, through whose instrumentality the sale is carried to completion, is entitled to the commissions."

To the same effect are the following authorities: *Higgins v. Miller*, 109 Ky. 209, 58 S. W. 580; *Carper v. Sweet*, 26 Colo. 547; *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269; *Johnson v. Lord*, 54 N. Y. Supp. 922; *Freedman v. Havemeyer*, 37 App. Div. 518, 56 N. Y. Supp. 97; *De Zavala v. Royaliner*, 84 N. Y. Supp. 969; *Whitcomb v. Bacon*, 170 Mass. 479, 49 N. E. 742, 64 Am. St. 317; *Alden v. Earle*, 121 N. Y. 688, 24 N. E. 705; *Bowser v. Mick*, 29 Ind. App. 49, 62 N. E. 513.

In this case Mr. Muehe bought through an entirely independent source, having given up any thought of buying through appellants. It may be that it would have been the graceful thing on his part to say, "I have talked this matter over with appellants and prefer to buy through them;" but he was not legally bound to do so, nor is there any testimony to show that he would have been able to do so, for his friends who furnished the money and closed the deal seem to have been actuated by a dual desire—to serve him, and at the same time assist Mrs. Simpson to earn a commission on the trade. Nor was respondent bound to refuse the customer when presented by Mrs. Simpson, he having the readiness, willingness, and ability to buy. Respondent was neutral in the transaction, and cannot therefore be bound.

"It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for un-

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successful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors. As was said in *Wylie v. Marine National Bank* (61 N. Y. 416, *supra*), in such a case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not the sale is to the very party with whom the broker had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure, therefore, and its consequences were the risk of the broker only." *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441.

See, also, *Ward v. Fletcher*, 124 Mass. 224.

The cases in this court, of *Von Tobel v. Stetson & Post Mill Co.*, *supra*, and other cases following it, go no further than to declare the general rule that a principal who has placed property in the hands of an agent cannot thereafter deal with the customer on his own account, or through a broker thereafter employed by him, and defeat the agent's commission. The case here presented falls within a different rule. The property was listed with two agencies, and the only

question open is which one was the efficient procuring cause of the sale.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7720. Decided June 5, 1909.]

MARY M. CAMPBELL, *Respondent*, v. ORDER OF
WASHINGTON, *Appellant*.¹

CORPORATIONS—PROCESS—ACTIONS—VENUE—FOREIGN CORPORATION. LAWS 1901, p. 356, § 6, requiring beneficial associations to appoint the state insurance commissioner, at Olympia, their statutory agent upon whom service of process may be made, does not require that actions against them be commenced in Thurston county, when such an association has no office or agent in the state for conducting its general business; Bal. Code, § 4854, requiring actions against a corporation to be commenced in the county where it has an office or any person resides upon whom process may be served, not applying in such a case.

INSURANCE—BENEFICIARY SOCIETIES—RECEIPT OF PREMIUMS—ESTOPPEL. A beneficiary association, cannot, after death of the insured, allege that it had no authority to issue a certificate guaranteeing a policy of another association which had been merged by it, where it had received and receipted for the premiums paid thereon.

APPEAL—PLEADINGS—AMENDMENT—INSURANCE. An answer in an action on a beneficiary certificate will be deemed amended to conform to proof received without objection as to a nonliability clause not pleaded in full.

INSURANCE—BENEFICIARY CERTIFICATE—NONLIABILITY CLAUSE—"INVOLUNTARY" SUICIDE—CONSTRUCTION—INSTRUCTIONS TO JURY. In an action upon a beneficiary certificate containing a nonliability clause in case the deceased member die "by his own hands whether sane or insane at the time, whether the act be voluntary or involuntary," there is no liability in case of an involuntary suicide; and it is error to instruct the jury to find for the plaintiff if they find the deceased did not commit suicide, which means to "intentionally do some act to intentionally cause his death" (CHADWICK, J., dissenting).

¹Reported in 102 Pac. 410.

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SAME—TRIAL—INSTRUCTIONS—ISSUES NOT SUBMITTED. In an action upon a beneficiary certificate, in which there are issues as to the plaintiff's exhausting her right of appeal in the society, it is error to instruct the jury to bring in a verdict for the plaintiff if they find in her favor upon the defense of suicide.

PRINCIPAL AND AGENT—AUTHORITY. Agency may be created by conduct; and upon the receipt of proof by letters and conversations, it is a question for the jury whether an agent acted within the real or apparent scope of his authority.

APPEAL—DISMISSAL—BRIEFS—FILING. An appeal will not be dismissed because the briefs are filed one day too late.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 27, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a beneficiary certificate. Reversed.

H. W. Lueders (*Jos. D. Coleman*, of counsel), for appellant.

Geo. D. Emery, for respondent.

GOSE, J.—The respondent was the plaintiff below. On the 28th day of February, 1905, the respondent and her husband, Alexander C. Campbell, became members of a fraternal organization known as the Independent Order of Lions, and on that day it issued to them a joint beneficiary certificate of membership, whereby and by its constitution and laws it promised to pay to the survivor, upon the death of either, the sum of \$50 as a funeral benefit, and \$25 per month for four years until the sum of \$1,250 had been paid, upon their compliance with the constitution, laws, by-laws, and regulations of the order. Thereafter the Order of Lions merged its membership with the Order of Washington, the appellant, a like fraternal organization; and on the 8th day of June, 1905, the appellant issued to them its written certificate of guaranty in the following terms:

GUARANTY CERTIFICATE No. 11308.

INDEPENDENT ORDER OF LIONS.

Certificate No. 6,535, issued by the Order of Washington.

In consideration of, and upon the warranties and statements made by, Alexander C. and Mary M. Campbell in application and

medical examination to the Independent Order of Lions, a society which has merged its membership with the Order of Washington, to whom was issued certificate No. 6,535, in the sum of \$1,250, and upon the payment of all dues and assessments as provided for in the constitution and laws of the Independent Order of Lions, and in compliance with all laws, rules, and regulations now in force and all amendments, changes, or additions thereto which may hereafter be adopted by the governing body of the Order of Washington, said society herein binds itself to pay the beneficiary or beneficiaries named in the within certificate, the benefits as provided for under the terms of said certificate; provided that the said member shall continue to faithfully pay all dues and assessments the same as before such certificate was accepted by the Order of Washington, and compliance with the laws of said Order of Washington as herein agreed. This slip to be attached to and become a part of certificate No. 6,535 formerly issued by the Independent Order of Lions to said member on the 28th day of February, 1905, and now indorsed and rewritten by the Order of Washington by this certificate No. 11,308 of the issue of the Order of Washington.

(Seal)

The Order of Washington,

By W. W. Terry, Supreme President.

By J. L. Mitchell, Supreme Secretary.

Dated at Portland, Oregon, this 8th day of June, 1905.

The respondent and her husband thereupon became members of the appellant order, and in May 31, 1906, paid to it their dues for the month of May of that year. On the 4th day of June, 1906, the said Alexander C. Campbell died. Proof of such death was thereupon submitted to the appellant, and after some negotiations and the failure of the appellant to make payment, this suit was instituted, resulting in a verdict and judgment in favor of the respondent. From such judgment, this appeal is taken.

The pleadings are lengthy, and many errors are assigned. With the view we take of the case, it will not be necessary to consider all the assignments, nor will we consider them in the order in which they have been presented.

The complaint alleges that the appellant is a fraternal beneficiary association, incorporated, organized, and doing business under the laws of the state of Oregon. This suit was instituted and tried in Snohomish county in this state. A demurrer was interposed to the complaint, which was over-

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ruled; whereupon the appellant appeared generally and moved for a change of venue, which was denied. It is now urged that, in view of the fact that the appellant was a foreign corporation, the trial court was without jurisdiction. We have held adversely to this contention. *Butler v. Supreme Court of Foresters*, 48 Wash. 147, 92 Pac. 66.

The further objection is urged against the complaint that it does not show that the appellant had authority to make the contract upon which a recovery was had. As we have said, the respondent and her husband became members of the Order of Washington, and paid their dues to it for the month of May, 1906. The appellant gave them its receipt, upon which is printed the name of the appellant, and which recites that its union No. 91 received from them local dues for the month of May, 1906. Prior to the issuance to them of the guaranty certificate, their membership had been in Whatcom Lodge, No. 47, of Bellingham, of the Independent Order of Lions. Upon the plainest principles of justice, the appellant cannot now be heard to urge this question.

A reading of the certificate given by the appellant discloses that its liability is predicated upon two conditions; (1) that the beneficiaries shall pay their dues and assessments as provided in the constitution and laws of the Order of Lions, and (2) that they shall comply with all laws, rules, and regulations of the Order of Washington. The evidence discloses that the constitution and laws of the appellant, at the time it issued such certificate, contained the following provisions:

"The death of a member by his own hands, whether sane or insane at the time, whether the act be voluntary or involuntary, . . . is a risk not assumed by this Order.

"No action, suit or proceeding shall be brought or commenced in any court, by or on behalf of any beneficiary, under any life benefit certificate of the order, until the complainant or complainants shall have exhausted all remedies within the order, first appealing from the subordinate union to the su-

preme executive board, and from the decision of the supreme board to the supreme union.

"Any person claiming any right or privilege under any life benefit certificate issued by the order, being dissatisfied with any decision of the supreme executive board in relation thereto, may appeal to the supreme union."

One of the defenses interposed was that the deceased died by his own hand, it being alleged that he committed suicide by taking carbolic acid. Whilst the appellant did not plead the clause quoted in full, its entire constitution and laws were received in evidence by consent, and the pleadings will therefore be treated as amended so as to present the entire defense available under the nonliability clause. This defense was the pivotal question in the case. The undisputed evidence showed that the deceased died suddenly from carbolic acid poisoning. The jury returned a special verdict, to the effect that he did not commit suicide. Touching the question of suicide, the court instructed:

"Gentlemen of the jury. I have decided to eliminate practically from your consideration every question except substantially two questions which I shall submit to you. The first is whether the deceased, Alexander Campbell, committed suicide or not. If you decide from the evidence in this case that he did not commit suicide, you need not proceed any further. If you say that he did not commit suicide, then you shall immediately render a verdict in favor of the plaintiff, the form of which I will give you. . . . To commit suicide means that one shall intentionally do some act to intentionally cause his death."

The giving of these instructions is assigned as error. Webster defines "involuntary" as signifying "contrary to one's will or wishes." Speaking to this question, in *Supreme Council of the Royal Arcanum v. Pels*, 110 Ill. App. 409, at page 411, it is said:

"Under a by-law providing that the certificate should be void if the insured 'whether sane or insane die by his own hand,' any self-destruction is excepted, and there is complete exemption from liability in case of suicide by the insured, not-

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withstanding he was wholly insane and incapable of understanding the physical nature and effect of his act. . . . Long before Pels became a member of the Royal Arcanum, it had been settled by a long course of judicial decisions in this and other states that the phrases 'commit suicide,' 'die by his own hand,' 'take his own life,' and their equivalents, did not mean or include, when used in a life insurance policy or in the by-law of a benefit society, the taking of the life of the insured by his own hand, if he was at the time insane."

In *Grand Legion of Select Knights, A. O. U. W. v. Korman*, 10 Kan. App. 577, 63 Pac. 292, 293, the court say:

" 'Die by his own hand,' 'die by suicide,' and 'commit suicide' are synonymous with 'voluntary suicide.' "

Again, in the same opinion, quoting from *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284, 23 L. Ed. 918, it is said:

"Nothing can be clearer than that the words 'sane or insane', were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one can be misled by them; nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as the legal, sense, suicide means, as we have seen, the death of a party by his own voluntary act; and this condition, based, as it is, on the construction of this language, informed the holder of the policy, that, if he purposely destroyed his own life, the company would be relieved from liability."

We have not overlooked the fact that the words under consideration have been construed as not including death by accident, in *Keels v. Mutual Reserve Fund Life Ass'n*, 29 Fed. 198. There are numerous other cases which hold that the words "death by one's own hand whether sane or insane" do not include death by accident. However, the word "involuntary," has a well understood, general meaning which accords with the definition quoted. We have before us a contract for construction, and the question is *res nova* in this court. We cannot escape the conclusion that the words have a broader

meaning than intentional suicide. In the *Keels* case the court said: "If it were intended by this policy to include death by accident, it was easy enough to say so." Webster defines an accident as "that which happens without any one's direct intention; unintentional." We have noticed that the words "death by one's own hand," have been held to mean "voluntary suicide." This is the almost uniform meaning which the courts have ascribed to these words. We think we must assume that the words "sane or insane," and "voluntary or involuntary" were placed in the policy to accomplish a purpose. To say that they signify nothing more than an intentional self-killing, is to deny them a part of their well known meaning. The courts in thus limiting them have said, *arguendo*, that they are the words chosen by the insurance companies, and that if they were intended to exempt the insurer from the obligation arising from death by accident, other words should have been chosen.

But we have not, then, passed the starting point. The question is, Are not the words apt, and do they not mean precisely what they say and what they are commonly understood to include? We cannot yield our assent to deny to those words their plain, ordinary, precise, and definite meaning in order that an unfortunate party may be brought within the terms of a harsh contract. In *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317, the court was considering a policy which exempted the insurer from liability if the insured should "die by his own hand or act, voluntary or otherwise." At page 322, the court say:

"The words 'voluntary or otherwise' preclude the parties claiming under the policy, if the act was one of suicide, from setting up the condition of mind of the party committing it, and contending that it was an involuntary act of suicide."

The state of mind of the assured is provided for in the instant case by the words "sane or insane." *Bigelow v. Berkshire Life Ins. Co.*, *supra*. Hence, we must conclude either that the words "voluntary or involuntary" shall be given their

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plain, ordinary meaning, or that they shall be cast off as surplusage. If the words "death by one's own hand," are synonymous with "voluntary suicide," as the courts have almost uniformly held, and the state of mind has been covered by the use of the words "sane or insane," may we not conclude that the words under consideration exempt the appellant from liability in case of involuntary suicide, from causes other than those proceeding from the act of an insane mind? We cannot approve the instruction without construing out of the words some of the vigor which the parties have placed in their contract.

The jury should have been instructed that, if the deceased came to his death by his own hand, whether sane or insane, at the time, whether the act producing death was voluntary or involuntary, there could not be a recovery. We do not commit ourselves to the doctrine that such a clause would exempt the insurer from liability in every case where death occurs from accident; but limited to the particular case, we have no difficulty in arriving at the conclusion that the instructions quoted were not a correct statement of the law. The case was seemingly tried by the court on the theory that the contract was governed by the laws of the Order of Lions, and by the appellant's counsel on the theory that it was governed by the laws of both orders. We have seen that the dues were to be paid according to the terms of the original contract, and that the liability in other respects was to be measured by the laws of the appellant.

The instructions quoted were erroneous upon another ground: They assume that, if the deceased did not commit suicide, the verdict should be for the respondent. We have seen that there are questions in the case such as exhausting the right of appeal according to the laws of the order which we have quoted. It is urged by the respondent that this question, together with the question of the cause of death, was waived by the appellant. These were questions of mixed law and fact, and were not submitted to the jury.

It is also urged that the court erred in permitting the witness Emery to testify as to his conversation with Dr. Tilzer, and in admitting in evidence the correspondence between the respondent's counsel and the appellant. The evidence of the witness Emery is that he talked to the doctor concerning the case at the head office of the appellant; that the doctor was in possession of the proof papers in this case. The letters admitted in evidence were from the appellant to the respondent's attorneys, written in answer to their inquiries about the case. The correspondence, as well as the parol testimony of the witness, was properly submitted to the jury. It is fundamental that agency may be created by conduct or by written or spoken words. It was a question for the jury to determine whether persons assuming to speak for the appellant were, considering all the attendant circumstances, acting within the real or apparent scope of their authority.

Other questions are urged, but in view of the fact that they will probably not arise upon a retrial, we will not consider them. We have not overlooked the respondent's motion to dismiss the appeal on the ground that the appellant's briefs were filed one day too late. The motion will be denied.

The case will be reversed, with directions to the trial court to permit the pleadings to be recast so as to state the issues according to this opinion.

RUDKIN, C. J., FULLERTON, DUNBAR, CROW, and MOUNT, JJ., concur.

CHADWICK, J. (dissenting).—It seems to me that there is more in this case than a technical definition of the words quoted and defined in the majority opinion. All contracts of the character assumed by the appellant and its predecessor in interest should be construed by reference to the principal undertaking. The Order of Lions issued a policy on the life of Alexander C. Campbell. No doubt he entered into the contract believing that his life was insured against death from any disease or casualty. To hold that an insurance company

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or beneficiary society can enter into a principal engagement to pay a certain sum in the event of death, and then so limit its undertaking by fine print provisos as to eliminate the possibility of recovery in case of accidental death, in my opinion does violence to the first principles of justice, and is contrary to well settled rules of jurisprudence, as declared by the courts in construing insurance policies, bills of lading, etc. The policy is unilateral and was evidently drawn with intent to mislead the assured, for certainly no reasonable man would knowingly subscribe to a contract so unfair, so unjust, and so clearly set as a snare for the unwary.

Further, the condition relied upon is not, in fact, the contract that was made between the parties. That was a simple contract to insure the life of the assured. A policy which should evidence that contract is now set up, in part at least, to defeat the claim. No reasonable minds could ever meet on the condition relied upon to sustain the defense in this case. The association took it upon itself to furnish the written evidence of the contract, and in doing so it switched the true contract, to which it had a right to attach reasonable conditions, to a sure-thing contract to be construed in accord with the real agreement only so long as the assured lived and paid his dues—a contract which the association assumed would never be read by the assured. Such contracts seldom are read. The party usually relies upon the well-spoken words of the agent. The added condition of the policy should not be held binding unless it appears that it was called to the attention of the assured and assented to. This is within the rule declared by this court in *Cole v. Union Cent. Life Ins. Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201, and *Foster v. Pioneer Mut. Ins. Ass'n.*, 37 Wash. 288, 79 Pac. 798. This doctrine is sustained on the theory that the application for the insurance is not merged in the policy, but is still vital to show the real agreement of the parties, and equally available to either in the event of a contest.

Notwithstanding the declaration of the majority that it is

not committed "to the doctrine that such a clause would exempt the insurer from liability in every case where death occurs from accident," I submit that the only way to beat out the policy upon which this action is based would be to die of an illness so lingering as to become a matter of common notoriety, or to succumb to the ravages of doddering old age. The case of *Keels v. Mutual Reserve Fund Life Ass'n.*, 29 Fed. 198, is on all fours with this case, and should have been followed. For these reasons, I dissent.

[No. 7672. *En Banc.* June 7, 1909.]

H. G. MANVELL, *Appellant*, v. W. H. WEAVER, *Respondent*.¹

CONTRACTS—CONSTRUCTION—LAWS AFFECTING CONTRACT. A contract requiring leased premises to be completely equipped for a restaurant kitchen is presumed to be made in contemplation of Laws 1905, p. 77, prescribing certain sanitary arrangements for such premises.

EVIDENCE—TO EXPLAIN WRITING—CONTRACTS—AMBIGUITY. A contract requiring the vendor of a restaurant business to deliver a lease of premises then in course of construction, which provided that the kitchen partition, dumb-waiter shafts, together with all necessary plumbing, piping, and wiring shall be done by the landlord without expense to the vendee, is ambiguous as to the cost of ventilating shafts required by law for kitchens, and oral evidence is admissible to show that the actual agreement contemplated a full equipment as a kitchen including the required ventilating system.

SAME—CONTEMPORANEOUS ORAL AGREEMENT—DELIVERY OF LEASE. Under an agreement for the delivery of a three-year lease of premises then in course of construction, which lease did not specify when the term was to commence, evidence is admissible to show a contemporaneous oral agreement whereby the lease was not to go into effect and the rent was not to commence until the building was completed.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 1, 1908, upon the verdict

¹Reported in 102 Pac. 36.

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of a jury, rendered in favor of the defendant, by direction of the court, after a trial on the merits in an action to recover purchase money paid. Reversed.

Sauter & Sheldon and Keenan & Hardinger, for appellant.
Aust & Terhune, for respondent.

CROW, J.—On February 25, 1907, the defendant, W. H. Weaver, owner of a restaurant in the city of Seattle, agreed to sell the same to the plaintiff, H. G. Manvell. It was located in the Arcade building, to which building the owner, the Moore Investment Company, was then constructing an annex. A written memorandum of sale was entered into between plaintiff and defendant, the material portions of which read as follows:

“Seattle, Wash., Feb. 25, 1907.

“This is to certify that Latsch & Barth, acting as agents for both buyer and seller, have this day received from H. G. Manvell the sum of two hundred dollars (\$200) as deposit to apply on purchase price of that certain restaurant situated in the basement of the Arcade Building, Seattle, Wash.

“The purchase price of said place to be two thousand dollars cash, payable as follows:

“This two hundred dollars (\$200) cash in hand and balance of eighteen hundred dollars (\$1800) on or before March 2d, 1907. . . .

“It is further understood that Mr. Weaver is to deliver a lease or cause same to be delivered upon that certain vacant store room now being completed in the Arcade Annex, together with the basement thereto, which shall be for a period of not less than three (3) years and at a monthly rental of three hundred dollars (\$300).

“Said location to be substantially as follows: The main store room facing First Ave. and directly opposite present Arcade Lunch, and on street level to be 20x100 ft., also a basement under rear of said store room and size approximately 50x60 ft.

“It is further understood that kitchen partition and provision for dumb-waiter shafts, together with all necessary plumbing, sewer connections, piping and wiring shall be done

by the landlord without any expense to said H. G. Manvell whatever.

"It is further understood that if said Mr. Weaver is unable to deliver or cause to be delivered the lease as specified above this contract shall be null and void and all deposit money returned to said H. G. Manvell, without any expense to him whatever. . . ."

It is conceded that possession was not delivered to plaintiff until March 4, 1907, at which time he paid \$1,800, the remainder of the purchase price, and the Moore Investment Company executed and delivered to him a lease of the store-room and basement, which made no reference to the equipment and fixtures to be installed therein. As the annex approached completion, the Moore Investment Company refused to construct, at its expense, any air shafts or ventilating tubes in compliance with chapter 48, Laws 1905, p. 77, so that the basement might be legally used at a kitchen. Thereupon the plaintiff, who contended that the defendant had violated his contract of sale in failing to procure a lease which carried such equipment with it, elected to cancel the contract and lease, and commenced this action to recover the purchase price paid by him, and other damages. In his complaint he pleaded the written contract of sale, and after making other allegations which need not be stated, further alleged:

"That thereafter, and on or about March 4, 1907, before the said building, including the premises, containing said room and basement, leased as aforesaid, was completed, and before the said room and basement had been equipped and constructed for use as a restaurant and kitchen, said defendant persuaded and induced plaintiff to go into possession of the said restaurant which he was then operating in the Arcade Building at the same time assuring plaintiff that the said room and basement as aforesaid would be immediately finished and completed according to the terms of his contract of sale, and relying upon the promises and representations of said defendant that the said room and basement thereunder would be thus finished and completed immediately, he consented to go into possession of said restaurant. That at the

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same time and place, and as a further reason for plaintiff going into possession of said restaurant as aforesaid, said defendant caused to be made by the Moore Investment Company, the owner of said premises, a lease, a copy of which is hereto annexed and marked 'Exhibit B' and made a part of this complaint. That at the time of the execution and delivery of said lease, the said building, including the said room and basement described in said lease as aforesaid, were in the course of construction; but at that time the said room and basement thereunder were not equipped and provided with dumb-waiter shafts from the basement to the dining hall above, nor with the plumbing, sewer connections, piping, nor with any means by which the said kitchen could be ventilated as provided by law. That upon the express statement, promise and agreement of said defendant that the said room and basement would be equipped as aforesaid, and that the same would be done at once, plaintiff accepted the said lease with the agreement that said lease would not go into full force and effect until the said room and basement thereunder were equipped and finished as aforesaid, and that from the date of such equipment the rent therefor was to begin to accrue; and relying upon the said promises and representations as aforesaid, said defendant knowing that plaintiff so relied upon and believed the said promises and representations, he, the said plaintiff, paid to said defendant the further sum of eighteen hundred dollars (\$1800). . . .

"Plaintiff further alleges that at the time defendant persuaded and induced him to go into possession of said restaurant and to accept the said lease from the Moore Investment Company, and to pay defendant the said sum of eighteen hundred dollars (\$1800) the latter well knew that the said Moore Investment Company never intended to finish, complete and equip the said room and basement thereunder so that the same could be used and occupied for a first-class lunch room, restaurant and kitchen in connection therewith."

The defendant, in substance, alleged, that the negotiations between the plaintiff and himself pertaining to the sale ended on February 25, 1907; that the plaintiff paid him the \$1,800 remaining due, and entered into a lease directly with the Moore Investment Company; that it was the express wish of the plaintiff that he be permitted to deal with the Moore

Investment Company in obtaining the lease, and that afterwards by the mutual agreement of plaintiff and the Moore Investment Company the lease was surrendered.

On a jury trial, the plaintiff offered evidence tending to show, (1) that the written memorandum of agreement above set forth did not fully state all the terms of the contract of sale, but that the defendant had agreed that the basement in the annex when leased and completed should, without expense to the plaintiff, be properly ventilated for legal use as a kitchen; (2) that the city authorities would not permit the plaintiff to use the kitchen for want of proper ventilation; (3) that on March 4, 1907, when the plaintiff made full payment of the purchase price, a new and independent agreement was orally entered into between him and the defendant by which it was stipulated that if the plaintiff then made full payment of the purchase money due on the contract of sale, the lease from the Moore Investment Company should not take effect or become binding upon the plaintiff until the leased room and basement then in course of construction were properly equipped and ventilated without expense to the plaintiff. On objections interposed by the defendant, all of this evidence was excluded. At the close of plaintiff's case, the trial court sustained a challenge to the sufficiency of his evidence, directed a verdict in favor of defendant, and entered judgment thereon. The plaintiff has appealed.

Appellant's assignments of error are based upon the action of the trial court in rejecting the evidence so offered. Prejudicial error was committed in refusing such evidence. The theory upon which the trial judge proceeded is shown by the following language, used by him in sustaining the respondent's challenge and motion for a directed verdict:

"Gentlemen of the jury, you will select one of your number as foreman. You have been called here to assist in the administration of justice, and I always think it is fair to you to say why cases are taken away from the jury. As a matter of law the court is compelled to prohibit any testimony in this case, by reason of the fact that there was a written agree-

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ment in this case, and the law says you cannot vary the terms of a written agreement by oral testimony. That is the reason I am doing this. I think it is only fair that you should know why the court does this."

It was the evident intention of the parties that the appellant should temporarily conduct the restaurant in its old location and thereafter in the new building, when completed, and that the respondent was to procure appellant a lease for three years on the new room and basement. It is also apparent that the parties were contracting for a lease that would permit the leasehold to be used for a restaurant business. Sufficient is stated in the written agreement to show that a complete equipment of the leased premises for that purpose was contemplated. Some portion of the premises would have to be used as a kitchen, but before any such use of it would be made, a complete compliance with the requirements of chapter 48, Laws 1905, page 77, was a necessary condition precedent, and the parties must be presumed to have had this statute in contemplation when making their contract.

The vital question to be determined in this action was whether the lessor or lessee was to sustain the expense of installing the necessary equipment for ventilating purposes. Was the burden to rest upon the appellant, or did the respondent agree to procure a lease relieving him from any such burden? When the evident purpose of the contract and its language are considered to ascertain the person upon whom the expense of installing the ventilating system should rest, it is found to be somewhat ambiguous and doubtful in its terms. The statute requiring such ventilation had to be observed, and the expense of installing the same would necessarily rest upon the one party or the other. There is not one word in the contract imposing any such burden on the appellant. It does provide for certain fixtures and improvements, but the only ones mentioned were to be installed without expense to him. Under these circumstances and conditions the appellant was entitled to show by proper evidence that the

actual agreement between himself and the respondent contemplated a full equipment, including the ventilating system to be installed at the expense of the Moore Investment Company. The written agreement is sufficiently ambiguous to call for the evidence offered; such evidence being admissible, not to add to or vary the terms of the written agreement or to change its purpose, scope, or meaning, but consistently with its terms, to explain its uncertainties, and disclose the exact agreement of the parties.

In *Lowry v. Adams*, 22 Vt. 160, 165, the supreme court of Vermont said:

"For the purpose of ascertaining the intent of the parties in entering into any contract, courts will look at the situation of the parties making it, the subject-matter of the contract, the motives of the parties in entering into it, and the object to be attained by it; and, even in cases where the contract is reduced to writing, will allow all these circumstances to be shown by *parol* evidence, if the intent of the parties, upon the face of the contract, is doubtful, or the language used by them will admit of more than one interpretation. See *French v. Carhart*, 1 Comst. 96, and observations of Jewett, Ch. J., p. 102; Chit. on Cont. 74, and notes. When, from the contract itself and all the surrounding circumstances, the true object and intent of the parties has been ascertained, courts will enforce the contract according to that intent, unless there be found in the way some stubborn, inflexible rule of law, absolutely requiring a different determination."

See, also, *Gould v. Boston Excelsior Co.*, 91 Me. 214, 39 Atl. 554, 64 Am. St. 221:

"Where the written evidence of a contract or a term thereof is ambiguous or uncertain, oral or extrinsic evidence is admissible to explain the ambiguity or clear up the uncertainty, in order that the real intention of the parties may be made to appear. For this purpose evidence of the facts and circumstances leading up to and attending the execution of the writing is admissible, and acts of the parties tending to show the construction which they themselves have placed upon it may also be shown." 11 Current Law, 1371.

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The written contract provided that the second payment of \$1,800 should be made on March 2, 1907. It was actually made on March 4. The appellant pleaded a subsequent oral agreement, the effect of which was that the lease, although executed and delivered, should not become a binding contract upon appellant until the fixtures, equipment, and ventilating system were fully installed and the room and basement were thus rendered fit for use as a restaurant and kitchen. Appellant should have been permitted to show such subsequent oral agreement if he could do so. The lease itself, which is in the record, tends to sustain his contention. It simply provides for a term of three years without fixing the exact date of its commencement or termination, evidently contemplating that it should commence when the building was completed, properly equipped, and ready for use. In other words, the term did not commence to run at once, but was to begin at some future time to be ascertained in some manner not stated in the lease. We see nothing in the lease or in the previous written memorandum of agreement inconsistent with the existence of the subsequent oral contract which the appellant pleaded, and should have been permitted to prove. *Reiner v. Crawford*, 23 Wash. 669, 63 Pac. 516, 83 Am. St. 848.

"Parol evidence is admissible to show that a contract of sale was delivered, not as a binding contract at time of delivery, but to become binding upon the performance of some condition or the happening of some contingency and that it has never become obligatory by reason of the fact that the condition has not been performed or that the contingency has not occurred." 9 Ency. Evidence, 494, and cases cited. See, also, *Cavanagh v. Iowa Beer Co.*, 136 Iowa 236, 113 N. W. 856.

The judgment is reversed and the cause remanded for a new trial.

MOUNT, DUNBAR, FULLERTON, PARKER, GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 7468. Decided June 8, 1909.]

SEATTLE & NORTHERN RAILWAY COMPANY, *Respondent*, v.
ANNE C. BOWMAN *et al.*, *Appellants*.¹

PLEADING—INTERVENTION—TIME FOR FILING COMPLAINT. Under Bal. Code, § 4846, a complaint in intervention is too late if not filed until after judgment.

JUDGMENT—VACATION—COLLATERAL ATTACK—PROCESS—CORPORATIONS. Where a default judgment against a corporation is regular on its face and recites due personal service, the acceptance of service by a *de facto* vice president cannot be attacked by a complaint in intervention, but only by direct attack on the judgment by motion or petition, under Bal. Code, §§ 5153, 5156.

JUDGMENT—MOTIONS—ESTOPPEL—APPEAL—REVIEW—THEORY OF TRIAL BELOW. Where parties have insisted on treating their petition as a complaint in intervention, after their right to intervene was challenged, they cannot, for the first time in the supreme court, have it considered as a motion or petition to vacate a judgment, long after the time for such proceedings had expired; as the cause must be considered on appeal on the theory adopted below.

CORPORATIONS—STOCKHOLDERS—MINORITY—EXHAUSTING REMEDIES IN CORPORATION. A complaint, by minority stockholders, of an alleged "freeze out" is demurrable where it fails to show that they have exhausted their remedies in the corporation, or any excuse for failure so to do.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered December 9, 1907, upon sustaining a demurrer to a complaint in intervention, dismissing a petition to vacate a judgment against an insolvent corporation, and for an accounting. Affirmed.

Frank Quinby, for appellants.

L. C. Gilman and *B. O. Graham*, for respondent.

Crow, J.—This action was commenced by Seattle & Northern Railway Company, a corporation, against Union Wharf Company, a corporation, to recover \$3,188.46 on an open account. Upon plaintiff's motion and notice, a receiver

¹Reported in 102 Pac. 27.

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was appointed, who took possession of defendant's property and filed an inventory and report. On September 22, 1904, a default judgment was entered in plaintiff's favor. On December 17, 1904, Anne C. Bowman, sole legatee of Amos Bowman, deceased, Melville Curtis, John Semar, B. F. McCracken, T. B. Childs, and Flora M. Reilly, having first obtained leave, filed their complaint in intervention, in which they in substance alleged, that the capital stock of the defendant corporation consisted of two hundred and forty shares, of the par value of \$50 each; that the interveners owned thirty-five shares; that since 1895, a majority of one hundred and forty-four shares had been owned by the plaintiff, but was carried in the names of certain private individuals; that plaintiff had removed the books and records of the defendant corporation from the state of Washington; that at no time since 1895 had there been any annual meeting of the stockholders or election of officers; that the defendant had transacted no business which would cause it to incur an indebtedness; that it was not indebted to plaintiff in any sum; that in this action plaintiff had caused service to be made on one S. H. Piles, who had accepted the same as defendant's vice president; that at the time of such pretended service he was not a stockholder, officer, or managing agent of the defendant corporation, and that the trial court never had jurisdiction to enter the default judgment. The interveners prayed that the judgment be vacated; that plaintiff be ordered to return defendant's books and records to this state; that a full accounting be had, and that judgment be entered against the plaintiff for any sum that might be found to be due from it to the defendant.

To this complaint in intervention the plaintiff interposed a general demurrer, which was heard on March 20, 1905, then taken under advisement, and sustained on April 17, 1905, as shown by a *nunc pro tunc* order entered on May 18, 1906. On May 12, 1906, the interveners asked permission to amend their complaint in intervention by adding thereto a

paragraph which in substance alleged that the receiver had conspired with the plaintiff to obtain the entry of the judgment and the sale of defendant's property, and to aid the plaintiff in "freezing out" the interveners as minority stockholders. This application being denied, the interveners stood upon their original pleading; whereupon judgment was entered dismissing them from the action. From this judgment they have appealed.

Appellants contend (1) that their complaint in intervention was filed in time; (2) that in any event it should be considered as a motion or application to vacate the judgment; and (3) that it states facts sufficient to entitle them to the relief demanded.

The statute, Bal. Code, § 4846 (P. C. § 272), provides that: "Any person may, *before the trial*, intervene in an action or proceeding, who has an interest in the matter of litigation, in the success of either party, or an interest against both. . . ." Appellants' complaint in intervention was not filed until after the entry of the judgment, which is regular upon its face, and affirmatively recites due and personal service upon the defendant. A complaint in intervention is filed too late if filed after judgment. It must be filed before trial, which necessarily precedes the entry of judgment. *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Hight v. Batley*, 32 Wash. 165, 72 Pac. 1034, 98 Am. St. 851; *Meadows v. Goff*, 90 Ky. 540, 14 S. W. 535.

Appellants nevertheless contend that the complaint in intervention was filed in time, because they allege that the person upon whom service was made was not the legally elected vice president of the defendant, that the judgment entered upon such service was void, and that no trial has yet occurred in the court below. The allegations mentioned are not sufficient to negative the showing of the record that Mr. Piles, upon whom service was made, who assumed to act as vice president in admitting service, and was presumably in possession of the office, was at least a *de facto* officer. No al-

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legation is made stating who was vice president, or who held any other office in the defendant corporation, or who was the person upon whom legal service could be made. In *Davis v. Edwards*, 41 Wash. 480, 84 Pac. 22, it was held that the title to an office in a corporation cannot be tried in a proceeding of this character. As the judgment is regular upon its face and recites due and personal service, it would seem that the validity of such service and the question whether the person upon whom it had been made was an authorized officer of the defendant, could only be questioned in a proceeding directly attacking the judgment, properly instituted by motion or petition under the provisions of Bal. Code, § 5153 *et seq.* (P. C. § 1033).

Appellants, however, contend that the complaint in intervention should be considered as such a motion or application to vacate the judgment and as a direct attack thereon. The record indicates that throughout all the proceedings the appellants themselves regarded their pleading only as a complaint in intervention. Its allegations, and the manner in which it was presented, negative the idea that it was otherwise regarded by themselves, the respondent, or the trial court, or that it was intended as a direct attack upon the judgment under the statute above mentioned. Appellants' proposed amendment, which was denied, was not of such a character as to invoke the court's consideration of the pleading on the theory that it was a motion or petition under Bal. Code, § 5155 or § 5157 (P. C. §§ 1035, 1037), but the amendment was requested with the manifest intention of perfecting the pleading as a complaint in intervention. Their present contention that the pleading was a direct attack upon the judgment, under the statute, seems to have been made for the first time in this court, to give it a standing to which it is not entitled as a complaint in intervention. Their cause must be considered here, upon the same theory on which it was presented to and considered by the trial court. *Normile v. Thompson*, 37 Wash. 465, 79 Pac. 1095; *Sanders v. Stim-*

son Mill Co., 34 Wash. 357, 75 Pac. 974. Appellants' right to intervene and the procedure adopted by them was challenged by the respondent long before the time expired within which they could have filed a motion under Bal. Code, § 5155 (P. C. § 1035), or a petition under Bal. Code, § 5156 (P. C. § 1036), to vacate the judgment. Notwithstanding such prompt challenge they continued to stand on their pleading on the theory that they were interveners, and that it was a complaint in intervention.

In any event, appellants' pleading does not state facts sufficient to give them any standing in court or to entitle them to relief. They are minority stockholders, attempting as such to litigate issues arising between the respondent and the defendant corporation. Their pleading contains no allegation that they have exhausted such remedies as may have been open to them within the corporation itself, or available by an application to its officers or trustees, nor do they allege facts sufficient to excuse the necessity of such action. Stockholders as such are not entitled to the relief demanded by appellants. The management of corporate affairs is properly vested in a board of directors, and it is against the policy of the law to permit stockholders as such to usurp their functions. When stockholders believe the corporation is about to incur loss or be injured in threatened or pending litigation, they should first consult with the directors, seek protection through them, and if possible, reach an understanding as to the merits and conduct of the litigation. They should not be permitted to resort to the courts in their capacity as stockholders unless the remedies thus sought are denied them by the officers and directors of the corporation itself.

The respondent's demurrer was properly sustained, and the judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, GOSE, DUNBAR, MORRIS, and FULLERTON, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 7987. Department One. June 8, 1909.]

C. B. FORLAND *et al.*, *Respondents* v. MARY BOYUM,
Appellant.¹

FRAUDS — STATUTE OF — BROKERS — CONTRACTS FOR COMMISSIONS. Where a written contract for a broker's commissions on a percentage basis was abrogated on negotiating a sale, and a flat commission of \$500 orally agreed upon, and the contract of sale made no reference to commissions except to provide that purchase money paid should, in case of default, be forfeited to the agents "to the extent of their agreed upon commissions," the second contract is not a mere modification of the first; and the contract of sale is insufficient as a memorandum of the agreement for commissions to entitle the broker to recover commissions under the statute of frauds requiring any agreement authorizing a broker to sell real estate for a commission to be in writing.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 5, 1908, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action for a broker's commission. Reversed.

Paul Shaffrath and *Austin E. Griffiths*, for appellant.

Alfred E. Parker, for respondents.

CHADWICK, J.—On January 2, 1907, the following contract was entered into between C. B. Forland and Mary Boyum:

"Seattle, Wash., January 2nd, 1907.

"To C. B. Forland: In consideration of the sum of one dollar to me in hand paid and of the services to be performed by you in endeavoring to effect a sale of the following described property, viz., lot five (5), block eighteen (18), Sarah A. Bell's Second Addition to the City of Seattle, with 14-room house, divided into three apartments, modern, I do hereby give and grant unto you for the period of thirty (30) days from date hereof and thereafter until withdrawn by ten days' written notice, the exclusive right to sell said property, and I agree to convey the same, or cause the same to be conveyed by good and sufficient warranty deed to the person or

¹Reported in 102 Pac. 34.

persons designated by you. The price of said property to be \$15,000, and upon the following terms: \$5,000, balance on four and five years, at 6 per cent. I further agree in case of a sale to furnish an abstract of title to said property, duly certified to date by a competent abstractor, and to pay you a commission of 5 and $2\frac{1}{2}$ per cent upon the purchase price, 5 per cent on the first \$10,000, $2\frac{1}{2}$ per cent on the balance.

"(Signed) Mrs. Mary Boyum, Owner."

Upon the trial plaintiffs were allowed to file an amended complaint reciting that the contract was in fact entered into for the use and benefit of plaintiffs. This is assigned as error, but, from the view we take of the law of the case, it is unnecessary to discuss it. Upon the same day, the following document was submitted to defendant, and approved by her:

"Seattle, Wash., January 2nd, 1907.

"Received of Marcus C. Ware, 419 Bailey Bldg., City, hereinafter mentioned as the purchaser, the sum of five hundred dollars, as earnest money, and in part payment for the purchase of certain real estate situate in King County, State of Washington, and particularly described as follows, to wit: All of lot five (5), block eighteen (18), Sarah A. Bell's Second Addition to the City of Seattle, together with any and all improvements thereon, which we have this day sold to the said purchaser for the sum of fourteen thousand five hundred (14,500) dollars on the following terms, to wit: Five hundred dollars as herein above receipted for, four thousand five hundred dollars on delivery of warranty deed, four thousand seven hundred and fifty on or before four years at 6 per cent per annum, four thousand seven hundred and fifty dollars on or before five years, at 6 per cent per annum (security to be first mortgage). Rents, insurance and interest on mortgages, if any, are to be apportioned from date deed is delivered. The risk of loss or damage to said premises by fire, until delivery of deed, is assumed by the seller to the limit only of amount allowed by the insurance companies. An abstract of title is to be furnished and 15 days' time allowed for the examination thereof. It is agreed that if the title to the said premises is not good, or cannot be made good within 30 days, this agreement is void, and the earnest money herein receipted for shall be refunded. But if the title to said premises is good, and the purchaser neglects or refuses

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to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to Forland and Company, of Seattle, to the extent of their agreed-upon commission, and the residue to the owner of the said premises. The property is to be conveyed by warranty deed of conveyance, free and clear of all liens and encumbrances of every nature whatsoever. Time is the essence of this contract.

“(Signed) Forland and Co., Agents, By W. A. Blackwood.

“I hereby agree to purchase said property on the above terms, and pay \$14,500 as specified above. Marcus C. Ware, Purchaser.

“The above sale is hereby approved. By Mrs. Mary Boyum, Owner.”

During the subsequent negotiations, some differences arose as to the amount and manner of payment, and a flat commission of \$500 was agreed upon; but a more substantial objection arose in that there was a defect in the title that was not, and could not be, cured within the limit of thirty days. The sale was never consummated. From a judgment in favor of plaintiffs, defendant has appealed.

Without discussing the facts in the case, but assuming that respondents did all that is ordinarily required to entitle a real estate broker to his commission, we are met at the threshold of our discussion by a legal proposition which is, under the previous decisions of this court, decisive of this case. Respondents' suit, if sustained at all, must be sustained under the second contract, and therefore the only question before us is whether it is sufficient under chapter 58, Laws 1905, page 110, § 1, wherein the statute of frauds is extended so as to include “an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.” While there are cases holding that, under a statute similar to our own, the terms of the broker's contract do not have to be set out in the memorandum or writing required by statute, the exact question has been before this court in the case of *Foote v. Robbins*, 50

Wash. 277, 97 Pac. 103, and in the case of *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473, wherein it was held that the terms of the employment must be set out in writing. In the first case cited the court said:

"The unmistakable purpose of the statute was to avoid any such method [resort to oral evidence] of fixing the extent of the liability or the liability itself, of either a vendor or a vendee for the payment of a commission."

These cases were decided upon the authority of *Zimmerman v. Zehendner*, 164 Ind. 466, 73 N. E. 920, which seems to be a leading case, and from which apt quotation is made, and is now referred to. The second writing is not a mere modification of the original contract so as to permit a recovery upon that theory. It is a complete, independent contract, certain in all its terms, except the amount of the commission to be paid. The provision relied upon for payment of commission is:

"But if the title to said premises is good, and the purchaser neglects or refuses to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to Forland and Company, of Seattle, to the extent of their agreed-upon commission, and the residue to the owner of the said premises."

Resort must be had to parol testimony to ascertain the amount agreed upon. Nor would the offer of the original contract prove anything without resort to oral evidence to bring it within the issues tendered by the complaint. 20 Cyc. 258; *Wilson's Assignee v. Beam*, 12 Ky. Law 367, 14 S. W. 362; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060.

Respondents contend that the modification in the contract was made for the benefit of appellant, and that therefore she should not be heard to complain. This might be true in some cases, but it can have no application where a contract falls within the statute of frauds. Such contracts are held void by force of the statute, and the rights of the parties can never be determined by resort to equitable principles.

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The case as presented falls within the statute, and the respondents cannot recover.

The judgment is reversed and the cause remanded with instructions to enter judgment for appellant.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7880. Department One. June 8, 1909.]

FRANK MCGUIRE, *Appellant*, v. BRYANT LUMBER & SHINGLE MILL COMPANY, *Respondent*.¹

JUDGMENT—BAR—RECITALS—DISMISSAL AND NONSUIT. In an action for personal injuries, a judgment, entered on motion of the defendant at the close of plaintiff's case, is a final judgment on the merits barring a subsequent action for the same cause, and not a judgment of nonsuit, where it recites that "plaintiff failed to establish that the defendant had been negligent at all or that plaintiff's injuries were the consequence of its negligence and because of such determination on the part of the court it enters judgment in favor of defendant."

JUDGMENT—RECITALS—CONCLUSIVENESS—IMPEACHMENT. Upon a plea of former adjudication, it is not admissible to impeach the recitals of the former judgment showing it to have been a dismissal on the merits, by evidence of the judge, clerk and stenographer at the former trial that the motion granted was one of nonsuit and not on the merits.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 1, 1908, in favor of the defendant, upon discharging the jury, dismissing an action for personal injuries upon the ground of former adjudication. Affirmed.

P. V. Davis (*Wm. Parmerlee*, of counsel), for appellant.

Graves & Murphy, for respondent.

MORRIS, J.—Appellant brought action, March 22, 1906, to recover for injuries alleged to have been sustained while in

¹Reported in 102 Pac. 237.

respondent's employ and through its negligence. Issue being duly joined, trial was had, and on July 3, 1906, judgment was entered dismissing the action. The principal and controlling question involved in this appeal is the character and effect of this judgment, as subsequently modified, which we will discuss later.

In July, 1907, appellant, contending, as he does here, that the judgment of July 3, 1906, was, in effect, one of nonsuit, brought a second action, setting forth, and seeking to recover for, the same injury as in his former action. Respondent answered, contending, among other things, that the judgment of July 3 was a final judgment upon the merits, and was final and conclusive as to the cause of action set forth in the second complaint. Appellant's reply contested this issue, and thereupon appellant moved the court to correct and modify the judgment of July 3, 1906, which motion was in some respects granted; and on June 8, 1907, the court made and entered its judgment which, omitting some of its former parts, is as follows:

"Whereupon plaintiff closed his case and the defendant, by its attorneys, moved the court for a judgment in its favor upon the ground that plaintiff failed to establish that the defendant had been negligent as alleged in his complaint or been negligent at all or that plaintiff's injuries were the consequence of its negligence. Whereupon, after argument of counsel and it appearing to the court that plaintiff's evidence was insufficient to establish negligence on behalf of the defendant, as alleged in his complaint or establish any negligence which would entitle him to a verdict and judgment as prayed for in his complaint, the court grants said motion and directs that judgment be entered in favor of the defendant and against the plaintiff.

"Wherefore, by reason of the facts aforesaid and upon motion of the attorneys for defendant, it is by the court ordered, adjudged, and decreed, that plaintiff take nothing by reason of his complaint, and that the above entitled action be, and the same is hereby dismissed, and that the defendant have and recover of and from the plaintiff its costs and disburse-

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ments herein to be taxed. To which order and judgment plaintiff excepts and exception is allowed.

"Done in open court this 8th day of June, 1907."

At the conclusion of the second trial, respondent, contending that this judgment was *res adjudicata*, moved for judgment. Appellant then asked leave to amend his reply by alleging the judgment to be one of nonsuit and not upon the merits, which amendment was granted. He then offered to prove, by the judge who tried the former case, by the stenographer who reported it, and by the entry in the court's minutes on the day of the first trial, that the motion granted by the court was one for nonsuit. These offers being denied, exception was allowed, and the court thereupon dismissed the action, holding the former judgment was *res adjudicata*, and appellant taking his exception brings the case here, contending these various rulings of the trial court to be error.

We will first consider the character of the judgment and its effect. The term "judgment" has been variously defined; but, without specifically referring to these definitions, it may be said to be the determination of the court upon the issue presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject-matter in litigation, and puts an end to the suit by specifically granting or denying the remedy sought in the action. 11 Ency. Plead. & Prac., pp. 820-829. It is defined in our code to be ". . . the final determination of the rights of the parties in the action." Bal. Code, § 5080 (P. C. § 719).

Nonsuit is the name of a judgment rendered against a plaintiff in a legal proceeding upon his inability to maintain his cause in court, or when he refuses or neglects to proceed to trial after issue joined and without determination of the issues. 6 Ency. Plead. & Prac., 828. Under our code, judgment of nonsuit may be entered "By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to

prove a sufficient cause for the jury." Bal. Code, § 5085 (P. C. § 727). Tested by these rules, the judgment entered by the court below was a final judgment, finally and conclusively adjudicating the rights of the parties upon the issues presented. It was in no sense a nonsuit. It recites a motion for a judgment, not because of any failure of plaintiff to maintain his cause, because of a technical omission or mispleading, but judicially determines that "plaintiff failed to establish that the defendant had been negligent at all or that plaintiff's injuries were the consequences of its negligence, and because of such determination on the part of the court it enters judgment in favor of defendant."

The vital issue in the action was the negligence of defendant and plaintiff's consequent injury, and when the court determined these questions as it did, it was a final adjudication of the rights of the parties upon that issue. Had the plaintiff failed to prove that defendant was a corporation, in case issue had been so framed, or that it was the owner of or operating the mill in which the injury occurred, or some other technical essential not going to or touching the vital issue of the controversy, it would have been a proper case for a nonsuit. But this judgment was entered, not because of any failure in any technical sense, but because of the court's conclusion upon the merits of the action. That this was the purpose and intention of the court is manifest from the record. When plaintiff made his motion to modify the judgment of July 3, 1906, he prepared and submitted to the court a form of judgment in which he recited that defendant moved the court "to withdraw this case from the jury by dismissing the case and entering a judgment of nonsuit upon the grounds that there are not sufficient facts proved to permit this case to go to the jury." In other words, the plaintiff by this recital sought to bring this judgment within the provision of Bal. Code, § 5085 (P. C. § 727), as above quoted; but the court, as manifesting that such was neither the motion nor its ruling, with a pen drew a line through such recital, and

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in place thereof wrote as set forth in the judgment above quoted. We therefore hold that the judgment entered was a final determination on the merits of the action, and was *res adjudicata* at the time of the second trial.

Did the court err in rejecting the offers of proof? We hold not. A judgment is too sacred and too solemn to be subject to any such attack. It was immaterial what the stenographer or clerk construed the proceedings to be; the judgment was the act of the court, and would be binding even against anything he might have said in his decision, which was no part of the judgment. As was said by this court in *State ex rel. Jensen v. Bell*, 34 Wash. 185, 75 Pac. 641:

"It is therefore manifest that there should be some standard in the record, to which reference may be made as the conclusive evidence of what has been actually decided. We believe, when a written judgment or order has been signed by the court, it should be regarded as such standard. We think it a safe one to hold that, when the court signs a written order, it shall be considered the evidence of its real and final act touching the subject immediately under consideration."

To the same effect is *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029, wherein it was held "that where there is a conflict between the clerk's minute entry of the court's proceedings and the formal written judgment signed by the judge, the latter will control and be deemed the actual judgment of the court."

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 8057. Department One. June 8, 1909.]

H. R. GEORGE *et al.*, *Respondents*, v. BEKINS MOVING &
STORAGE COMPANY, *Appellant*.¹

WAREHOUSEMEN—LIEN—CHARGES—EVIDENCE — PAYMENT — SUFFICIENCY. In an action of replevin for a piano held for storage charges, the evidence is insufficient to justify a verdict for the plaintiff, where it appears that he refused to pay a balance due of \$40, necessary to discharge defendant's lien for charges, for the reason that a few days before he had paid within \$1.95 of the charges said to be due at that time, and had been assured the further cost of cartage on removal of the goods would not exceed \$25, where there was no attempt to show that the charges were unreasonable or the services charged for not rendered; as defendant's previous statement did not preclude proper additional charges.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 22, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action of replevin. Reversed.

Totten & Rozema, for appellant.

Thomas B. MacMahon, for respondents.

MORRIS, J.—Respondents shipped their household goods from St. Paul to Seattle, via Northern Pacific railway, and consigned them to appellant. Upon the arrival of the goods, appellant paid all charges, including freight, and removed them to its warehouse, being instructed by respondents to store the goods until notified to remove them elsewhere. Under these instructions, the goods were stored from November 12, 1906, to December 17, 1906. After the goods had been in appellant's warehouse about a month, Mr. George inquired as to the sum appellant claimed to be due on account of freight, storage charges, etc., and was informed that he was owing \$151.95, of which sum he then paid \$150, on account, leaving a balance as he understood of \$1.95. Mr.

¹Reported in 102 Pac. 23.

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George in a few days requested appellant to remove the goods to his home in West Seattle, and upon inquiring the price he was told it would not be over \$25. When the goods reached the house and were all delivered except a piano, a bill for \$40 was presented, which Mr. George refused to pay, except the sum of \$25, claiming it to be excessive, and upon his refusal the piano was taken back to appellant's warehouse and held as security for the balance due. The items forming the account as presented were these:

Advance charges and freight to Seattle.....	\$143.20
Cartage, car to warehouse.....	10.50
Storage, Nov. 12 to Dec. 17, at \$8.75 per month..	13.15
Cartage to West Seattle.....	23.65
Total	\$190.50
Credit by cash.....	150.00
Bal. due	\$ 40.50

Respondents then brought this action to recover the piano or its value, and upon the trial the jury returned a verdict in their favor in the sum of \$300, which they found to be the value of the piano. Judgment was entered upon the verdict awarding the piano to respondents, or, in lieu thereof, its value at \$300; from which, a motion for new trial being denied, appeal is taken.

It is difficult to discover any theory upon which this judgment can be sustained. Appellant, being a warehouseman, had a lien upon the goods until the proper storage charges were paid. There was no attempt to show that the charges of appellant were unreasonable, nor that the services charged for had not been rendered, nor the advance charges and freight had not been paid. Respondents seem to have proceeded on the theory that appellant having said to them the cost of moving the goods to West Seattle would not exceed \$25, they were entitled to a delivery of the goods upon payment of that sum. But that was only one item in appellant's account against them. Appellant was entitled to have all its proper charges paid before it could be called

upon to make a delivery. The fact that respondents were told that their bill was \$151.95 at the time they called upon appellant and paid it \$150, did not preclude an additional proper charge for such length of time as they might leave the goods in appellant's warehouse. Neither did it prevent appellant from including in the account any proper item, such as the charge for moving the goods from the car to the warehouse.

The court below should have granted a new trial upon the ground of insufficiency of the evidence to justify the verdict and that the verdict is against the law; and for its error in not doing so, the judgment is reversed, and the cause remanded with instructions to grant a new trial.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

[No. 7822. Department Two. June 8, 1909.]

JOHN HARTIG, *Respondent*, v. THE CITY OF SEATTLE *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—CHARTERS—ADOPTION—INITIATIVE AND REFERENDUM. Under Const. art. 11, § 10, authorizing a city of 20,000 inhabitants to frame a charter for its own government, consistent with and subject to the laws of the state, a city may, subject to such limitation, adopt the initiative and referendum plan of government.

SAME—VALIDITY—STATUTES. The initiative and referendum plan of government adopted pursuant to Const. art 11, § 10, authorizing a city to frame its own charter, is not inconsistent with Bal. Code, § 740, vesting the legislative power of cities in a mayor and council; since such section applies only to powers provided for in the charter.

SAME—ADOPTION OF CHARTER—IMPLIED REPEAL OF STATUTES. Bal. Code, § 740, vesting the legislative power of cities in a mayor and council, does not prevent the adoption of a charter providing for the initiative and referendum form of government, because it would be impliedly repealed thereby.

¹Reported in 102 Pac. 408.

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Opinion Per DUNBAR, J.

INTOXICATING LIQUORS—LICENSES—STATUTES—IMPLIED REPEAL. Bal. Code, § 2934, providing that the mayor and council of each city shall have the sole and exclusive authority to license or prohibit the sale of intoxicating liquors is impliedly repealed by Bal. Code, § 739, conferring upon cities of the first class power to frame their own charters and to regulate the sale of intoxicating liquors.

SAME—STATUTES—CONFLICT—GENERAL AND SPECIAL LAWS. The city council of Seattle has exclusive power to license the sale of liquor without submitting the question to a vote of the people under the initiative and referendum amendment to the charter of the city covering "any ordinance dealing with any matter within the realm of local affairs or municipal business," and under the concurrent amendment No. 11, especially conferring upon the city council the power to license and regulate the sale of liquor; since special concurrent laws obtain as against a conflicting general law.

APPEAL—REVIEW—REASONS FOR DECISION. Where the sustaining of a demurrer was correct on any ground, the decision will be affirmed.

Appeal from a judgment of the superior court for King county, Griffin, J., entered August 4, 1908, in favor of the plaintiff, upon sustaining a demurrer to the answer, granting a writ of mandamus. Affirmed.

Scott Calhoun and *H. D. Hughes*, for appellants.

Richard Saxe Jones and *James A. Snoddy*, for respondent.

DUNBAR, J.—The respondent made application for a license to sell liquor in the city of Seattle, in King county. The city comptroller refused to issue the license by reason of the provisions of the referendum amendment to the city charter. Upon the refusal of the city comptroller to issue the license, respondent applied to the superior court and procured an alternative writ of mandamus. The appellants made return thereto, admitting all the allegations of the respondent's complaint, but pleading the existence and provisions of the referendum act of the city charter. Respondent demurred, not alone upon the ground that the said charter amendment was void as stated, but upon the ground that the pretended facts alleged in said answer and return did not

constitute a defense therein, nor did they show any legal ground why a peremptory writ of mandamus should not issue. The issue of law was presented to the Honorable Arthur E. Griffin, judge of the superior court, and after consideration, the matter was decided by sustaining respondent's demurrer.

There is but a single question presented in this appeal, and that is the validity of the amendment to the charter of the city of Seattle, adopted March 3, 1898, commonly known as the initiative and referendum amendment; and, also, we might say, the effect which amendment No. 11, which was adopted on the same day on which the referendum amendment was adopted, has upon the initiative and referendum amendment. Section 1 of art. 4 of the referendum provides:

"The legislative powers of the city of Seattle shall be vested in a mayor and city council, who shall have such powers as are provided for by this charter; but the power to propose for themselves any ordinance dealing with any matter within the realm of local affairs or municipal business, and to enact or reject the same at the polls, independent of the mayor and city council, is also reserved by the people of the city of Seattle, and provision made for the exercise of such reserved power; and there is further reserved by a provision made for the exercise by the people of Seattle of the power, at their own option, to require submission to the vote of the qualified electors, and thereby to approve or reject at the polls any ordinance, or any section, item or part of any ordinance, dealing with any matter within the realm of local affairs or municipal business, which may have passed the city council and mayor, acting in the usual prescribed manner as the ordinary legislative authority. . . ."

This will be a sufficient statement of the act, we think, for the purposes of this discussion.

Of course, it is the contention in this case that this question of the granting of the license to the applicant should have been submitted to the voters upon proper showing made, as provided for in the amendment. The appellants have presented a very exhaustive and interesting brief in support of

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the validity of this amendment, but as the respondent does not controvert the position taken by the appellants on many of the propositions urged, we will confine our investigation to the points urged against the validity of the charter amendment. First, it is contended that the amendment is in violation of § 10, art. 11, of the constitution of the state of Washington. But, as we understand appellants' position, it is that the amendment is violative of the constitution because it is inconsistent with Bal. Code, § 740 (P. C. § 3733), not that it is independently inconsistent with any express provision of the constitution. It could not very well be, for the constitution seems to give the city absolute power of government, with only the restriction above mentioned. The constitution provides that any city, containing a population of 20,000 inhabitants or more, shall be permitted to frame a charter for its own government, consistent with and subject to the constitution and laws of this state. So that, under the power of the constitution, subject to the limitation above mentioned, there can be no question of the right of the city to adopt and carry into effect the initiative and referendum plan of government; for it can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people. Whether the expression of the will of the people be made directly by their own acts or through representatives chosen by them is not material. The important consideration is a full expression. Does, then, the amendment under consideration in any way conflict with § 740, the pertinent part of which is as follows:

"The legislative powers of any city, organized under the provisions of this act, shall be vested in a mayor and a city council, to consist of such number of members, and to have such powers, as may be provided for in its charter," etc.

The first thought that occurs to one in reading this section is that, while the powers are vested in the mayor and council, they are only such powers as are provided for in the

charter. So that, after all, the powers spring from the people and are not over and above the control of the people. And this was the view taken by this court in *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609. It was also decided in that case that the act of 1903 (Laws 1903, p. 393, ch. 186) was a valid act, not being in any way obnoxious to any constitutional provision, and that said act repealed by implication § 740, *supra*. This was a well considered case, and an exhaustive opinion was rendered therein. As we are satisfied with what was said in that case, we think it unnecessary to again enter into a discussion of the questions there determined.

But again, Bal. Code, § 2934 (P. C. § 5714), relied upon by respondent, has been repealed by Bal. Code, § 739 (P. C. § 3732), relating to the organization and powers of cities of the first class, which gives the power to the city under the provisions of subd. 32, to regulate the selling or giving away of intoxicating, malt, vinous, or fermented liquors. This question was squarely decided by this court in *Seattle v. Clark*, 28 Wash. 717, 69 Pac. 407. It is true that there have been some subsequent cases which might seem in some particulars to be opposed to the rule announced in that case, but in those cases the question of the repeal of the statute was not presented nor considered, and there never has been any express intention to overrule the *Clark* case, *supra*, where this question was squarely presented and passed upon.

But there is a more local question in this case which it seems to us is controlling; for notwithstanding the rights reserved by the people under the referendum amendment, and the general provision that it shall apply to all ordinances, by a concurrent act, viz., amendment No. 11, adopted the same day, the power to license and regulate the sale of liquor is especially conferred upon the city council, and it cannot be questioned that, if the voters have the power to pass the referendum act, they have the power to delegate the authority which it seems they did delegate in the 11th amendment. The provision is that the city council shall have pow-

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Syllabus.

er, by ordinance and not otherwise, to license, tax, confine within limits of time and place to be by the city council prescribed, and to otherwise regulate, the selling or giving away or other disposition of intoxicating, spirituous, malt, vinous, mixed, or fermented liquors, and the collection of the license money therefrom for the use of the city, etc. This and many other provisions of the amendment seem to point conclusively to the fact that it was the intention of the voters to vest this power exclusively in the city council, and under the universally accepted rule that, where general and special concurrent laws are conflicting, the provisions of the special law must obtain, we are compelled to hold that the power to grant licenses to sell liquor is vested in the city council of said city. This was not the point on which the demurrer was sustained; but that is immaterial, if we determine that it was correctly sustained. This point is raised in respondent's brief, and is therefore entitled to consideration.

The judgment is affirmed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8077. Department Two. June 8, 1909.]

FRANCIS L. JOCK, *Respondent*, v. COLUMBIA & PUGET
SOUND RAILROAD COMPANY, *Appellant*.¹

MASTER AND SERVANT—FELLOW SERVANTS—COMMON EMPLOYER. A common laborer, directing and assisting in the unloading of a car of lumber, is a fellow servant as to another laborer who was caught by the falling of the lumber upon chopping off the last of the side stakes holding the lumber; since they were engaged in a common simple service, each assisting the other in the details of the work, and the injured servant had opportunities to protect himself against the alleged negligence of the other in removing props supporting the lumber.

SAME—VICE PRINCIPALS—SUPERVISION—DETAILS OF WORK. The direction by a gang foreman to one common laborer to go with an-

¹Reported in 102 Pac. 405.

other who would tell him what to do in the unloading of cars of lumber, does not make such other a vice principal, as to incidental acts and details while working together in unloading the lumber.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action by an employee for injuries sustained in the fall of lumber through the alleged negligence of another servant in removing a prop, there is not sufficient evidence of the negligent act to warrant a verdict for the plaintiff, where no one saw the prop removed, the plaintiff merely testifying that the prop was in place when he started to work, and after the accident, and that, at a time while suffering intensely, he saw it on a near-by pile of lumber; and the removal of the prop was denied and no attempt was made to identify it.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—UNLOADING CAR OF LUMBER. A laborer, unloading a car of lumber under the direction of another common laborer, is guilty of contributory negligence, precluding any recovery, where, after removing the side stakes at either end of the car, and being unable to remove the center stake, he chopped it off, and the lumber then slid from the car and fell upon him, although he had had no previous experience.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 31, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee unloading a car of lumber. Reversed.

Farrell, Kane & Stratton, for appellant.

John T. Casey (*Heber McHugh*, of counsel), for respondent.

DUNBAR, J.—This is a personal injury action. At the time of the accident complained of, the defendant railroad company, the appellant in this case, operated a short railway in King county. The gang foreman of the company was one C. A. Bassett. He it was who employed plaintiff as a common laborer a short time before the accident. There was also one Williams in the employ of the company in the capacity of a common laborer. While plaintiff and Williams were working together unloading a car of lumber, the plaintiff was injured by lumber falling upon him, breaking his leg so that ampu-

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tation became necessary. The action was brought against the Pacific Coast Company and the Columbia & Puget Sound Railroad Company, but, at the time of the trial, was dismissed as to the Pacific Coast Company. The plaintiff testified that he had told Mr. Bassett that he was inexperienced so far as unloading cars was concerned, but that Bassett told him to go with Williams, who would direct him what to do. This was the substance of the testimony on that point. As to the testimony concerning the accident, the plaintiff testified as follows: After a statement concerning the removal of a load of lumber which Williams had pointed out, he said:

"Before I got that done Mr. Williams left the place. He remained away probably ten minutes—I was standing by the car waiting for him when he returned. He told me to drive out the stake at the south end of the car with an axe. The stake came out, and I steadied it so it wouldn't fall on us. Mr. Williams took the stake and moved it a few feet from the corner and let it rest against the timbers.

"Q. (By the court) Did it furnish any support to the lumber in the car in that position?

"A. Yes, sir. It supported it. It appeared to be a way of unloading. The car appeared perfectly safe without those stakes. Then we went to the center stake and tried to drive that out and it wouldn't come, so as we did so, Mr. Williams said, 'We will get that maul,' and on his way to the maul—that was on the south end of the car—he took the stake which was up against the car, which I thought acted as a brace, and carried it away. And I had asked him once before if he knew how to unload lumber. He said, 'Yes,' and I just repeated the question; asked him if he knew how. He replied that he had unloaded them before. We drove at the middle stake; it didn't come; so we moved up to the stake at the north. It came out and was placed up where the first stake had been placed, against the car, resting under the flanges of the timber about an inch. Then Mr. Williams told me to cut off the stake just above the clasp.

"Q. The second clasp, after he put it against the car, did you have anything to do with it?

"A. I took a glance at the car and it appeared safe and I

naturally thought it (the stake) was a protection and safety. I merely steadied the stake to see that it was solid against the side of the car. Then he pointed to the place where the middle stake had to be cut. I cut the stake. I chopped the stake about half off. While I was chopping, the dust was falling from the car and I pulled my hat over my eyes. The wind was blowing. It was a windy day. The next I heard was a scream, 'Watch out,' and at the very instant I heard the 'watch out,' the middle stake gave way. The axe hit me on the knee, and then the timbers slid from the side of the car, from bottom and top. Both were coming at once. It was impossible for me to go underneath the car. The only hope was to go right out. I made best effort to get out. As I was pretty near out of the way, my left foot got caught with the top plank, and my leg was all broken, and crushed about middle ways the knee, and all the foot was completely crushed. The right—under the knee it was broken there, and I think turned on the joint and broken above the knee, and then where it was amputated. While lying on the ground after the injury for about two hours, I noticed that one tier of planks had completely slid off the car. I noticed that the stake I had cut was underneath the timbers; that it was the only one underneath the timbers. Two were in the pile I had laid to one side. The rubbish pile was about 20 feet from the side of the car. There was no one else around the car but Mr. Williams and myself. I didn't see him take that stake away that was placed against the side of the car, when I started chopping the middle stake. Mr. Williams did not take that stake away after the lumber fell. No one else did either."

There was some repetition both in direct and cross-examination, but the above, taken from the respondent's brief, is substantially the testimony on the material points in the case. The complaint is very brief and simply charges negligence in causing the stakes and braces, which were supporting the lumber and timber of the car, to be removed and taken away during the time that plaintiff was cutting at the center stake. The answer denied allegations of negligence on the part of the defendant, and alleged that Williams and the plaintiff were fellow servants; alleged negligence on the part

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of the plaintiff, and assumption of risk. At the close of plaintiff's testimony, the defendant challenged the sufficiency of the testimony, which motion was overruled. The same motion was made and overruled at the close of the whole case. The case was given to the jury, and a verdict rendered for \$13,000. Judgment was entered, and appeal follows.

It is claimed by the appellant that the circumstances of this case plainly show, that the respondent and Williams were fellow servants; that respondent was guilty of contributory negligence, and that the evidence was not sufficient to sustain a verdict in any particular. It is contended by the respondent that many of the cases relied upon by appellant are not in harmony with the principles announced by the decisions of this court, and this to a certain extent is true. But, while this court has, as compared with many other courts, limited the application of the doctrine of master and servant, and while it desires to adhere to the policy heretofore announced in this class of cases, an intelligent analysis and construction of the cases decided will not warrant the conclusion that Williams was the vice principal of the appellant in the transaction involved. But it will appear that in each and every case decided there was some element or circumstance tending to establish the responsibility of the master which does not appear in this case, and that the logic of the opinions in those cases would not tend to establish the relation of master and servant in a case of this kind.

There are many considerations which enter into the determination of whether laborers in given cases are fellow servants, but one of the most important considerations is whether the servant receiving the injury, by reason of the negligent act of a co-laborer, was in a position in which he could have protected himself against such negligent acts; or, as expressed in *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 688, where in answer to the claim of the employer that an exception existed to the general rule that whoever is injured by the negligence of a servant in his master's business is en-

titled to redress from the master, by reason of public policy, discussed in that case, it was said:

"This reason can have no application to employees whose situations allow them no connective influence over each other. . . . Nor can it be extended to other employees who for any cause are not in a situation to exert such an influence on their fellows. It follows, therefore, that the cases to which this exception applies are only those where the servant receiving the injury is engaged with the servant inflicting it in a common business where he has an opportunity to exercise a preventive care over his negligence."

Of course, the logical inference was that, where the opportunity mentioned did exist, the relation of a fellow servant would be established. This court has acknowledged the exception mentioned by the Georgia court, in many cases, though deciding the cases adversely to the master for the express reason that the cases under consideration were not brought within the exception. Thus, in *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727, the Georgia case, *supra*, was made the basis of the decision, by adopting the distinction therein expressed, the court saying:

"Applying these principles to the case at bar, it seems to us that the millwright, in this instance, could in no sense be considered a fellow servant of the sawyer below. He was not in the same employment. He was not engaged in manufacturing lumber, which was the business of the mill. The sawyer had no opportunity to use precautions against his negligent acts."

In speaking further of the doctrine of fellow servant, the court, at page 539, said:

"Its original application was based upon the plainest principles of justice, and the doctrine was applied to persons who were working in a common employment and who had an opportunity to observe, if not to a certain extent control, the actions and methods of those with whom they were working and who were in reality, under the plainest definition of the term, their fellow servants. Thus, so far as rural employments were concerned, if two men were engaged in loading a wagon with hay, and it was so overloaded or so unskill-

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fully loaded that it toppled over, thereby injuring one of the laborers, the master could not justly be held liable; and the doctrine of fellow servants, for obviously just reasons, was applied, for the laborers had in hand and under their control the performance of this work and were in a sense both of them agents or vice principals of the master. In manufacturing employments it was the same. The doctrine was applied simply and humanely on the theory that, standing on a level with each other, both as to employment and authority, they had notice which the master necessarily could not have of the dangers liable to result from the action of the workers; and, in thus noticing and continuing in the employment without an attempt to rectify it, to them it was a disclosed or apparent danger, the perils of which they assumed, ..."

This case, it seems to us, falls squarely within the illustration given in that case where the doctrine of fellow servant should apply. The two men were working together. They were both under a common employment; both conceded to be common laborers. They were conversing and counseling about the manner of unloading the lumber. One of them steadied the stakes to keep them from toppling over, while the other one cut them off. It was a simple service which was to be rendered. There was no machinery involved, intricate or otherwise. The respondent could see clear around the whole transaction. He was working side by side with his co-laborer, each assisting the other in the details of the work, and in a position where he could have protected himself against the negligence of his co-laborer if he had paid any heed to him. The doctrine announced above was also approved by this court in *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932; *Bateman v. Penttular R. Co.*, 20 Wash. 133, 54 Pac. 996, and *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174, which were decided against the master for the reason that the facts did not show opportunity to use precaution against the negligence of the co-laborer.

Nor do we think that the announcement made by the gang

foreman was sufficient to constitute Williams a vice principal. It may possibly have constituted him a vice principal for general directions, or for pointing out to respondent where and what his work was. This, evidently, was all that was intended. But there is no allegation or proof that respondent was sent to a dangerous place by Williams. On the contrary, the accident happened, according to the respondent's own testimony, by reason of an independent act of Williams, entirely incidental to and a detail of the transaction, and which was peculiarly the act of a fellow servant for which the master could not be held responsible. Labatt, Master & Servant, §§ 586, 587, 588.

The complaint is based exclusively on the alleged negligence of Williams in removing the prop. The testimony on this proposition is not sufficient to sustain a verdict. It was purely a surmise on the part of the respondent. He simply testified that, when he last noticed the prop, it was under the edge of the lumber at the south end of the car; that he did not see Williams remove it, but that after he was injured, and while he was still pinioned by the lumber and suffering from this fearful accident, with his foot mashed and his leg broken above and below the knee, he noticed that the stake he had cut was underneath the timber which had fallen off the car, and that the other two stakes were on a rubbish pile about twenty feet from him. He did not see Williams remove the stake. Williams did not tell him that he removed it. No circumstances were related tending to show that Williams did remove it, or that he would have any reason or motive for removing it. In fact, if he put it there for the purpose of sustaining the lumber until the middle stake was cut, he would naturally leave it there until the purpose was effected. Neither was there any attempt made to especially identify the stake he saw on the lumber with the stake that was used as a prop. There was no description whatever given of it, and no reason assigned why he thought it was the particular stake. If it was the same stake, it may have fallen over by reason of the

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jar made by the axe, without any action whatever on the part of Williams; or Williams may have picked it up and thrown it on the lumber pile after the accident. But the testimony simply shows that, when he started to cut off the middle stake, the prop was at the south end of the car, and that, when he recovered from the shock of the hurt and took a view of the premises, the prop was on the lumber pile. Outside of the fact that Williams testified positively that he did not remove the stake, the testimony of the respondent did not make a *prima facie* case on that proposition, and the jury could not reach the conclusion that Williams did remove the stake, without resorting to guesswork and surmise. Of course, it is well established that the jury is the judge of the credibility and reasonableness of the testimony. But it is just as well established that verdicts must be based on facts proven, and not on speculation and surmise.

From all the circumstances of the case, we also think that the respondent was guilty of gross contributory negligence in the manner in which he attempted to unload the car. It is true that he testified he had no experience in unloading cars, but the testimony shows that he was a man of several years' experience in similar kinds of work; and without experience, any one who understands the natural laws and forces which surround us and which we are compelled to take notice of every day, ought to have known better than to release the lumber at the ends before taking out the stake in the center. If the stake served to hold the lumber on the car at all, there could be but one result from such a proceeding. Even if the prop at the south end had remained, it would not have prevented what happened; for when the center prop was removed, the lumber being released at the north end would have fallen just the same if it was resting on that prop. Its position could not be maintained by propping it at one end. Or even if respondent could be justified in presuming that it could, it was negligence to remove the permanent support

and substitute one that was not so efficient, and one that a jar might, and probably did, displace.

Unfortunate as was the accident and lamentable as the result proved to be, we are compelled to hold that no cause of action has been proven. The judgment is therefore reversed, with instructions to dismiss the action.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 7797. Department One. June 9, 1909.]

HENRY WATT *et al.*, Respondents, v. THOMAS T. KILBURY
et al., Appellants.¹

INNKEEPERS—LOSS OF PROPERTY—BURDEN OF PROOF. Upon proof of the loss of personal property from the room of a guest at a hotel, the burden of proof is upon the innkeeper to show facts exonerating him from liability.

SAME—LOSS BY GUEST—EVIDENCE—SUFFICIENCY. The evidence was sufficient to fix upon an innkeeper, as the insurer of the property of his guest at common law, liability for loss of a lady's hand bag containing a gold watch and \$460 in money, which the guest left upon her bed while absent from the room for a few minutes, notwithstanding a conflicting statement made by the guest, an old lady in ill health, while greatly agitated over the loss.

COMPROMISE AND SETTLEMENT—INNKEEPER'S LIABILITY—LOSS BY GUEST. Where guests suffered a loss of personal property left in their room, a note given in payment for a balance due upon room rent in order to release their baggage, is not a settlement of the claim for the loss of property.

INNKEEPERS—LOSS BY GUESTS—EXEMPTION BY NOTICE—STATUTES—COMPLIANCE. A hotel keeper is not exempted from liability for the loss of property of guests under Bal. Code, § 5977, where he failed to keep an iron safe or vault in good order for the custody of valuables, and failed to post a copy of the statute in the sleeping rooms, as required by the act; as the act must be exactly complied with to relieve from liability.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 6, 1908, upon findings in

¹Reported in 102 Pac. 403.

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favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to recover for the loss of personal property stolen from the room of guests at a hotel. Affirmed.

Munter & Lovejoy and Neal, Sessions & Myers, for appellants.

Belt & Powell, for respondents.

GOSE, J.—The respondents, the plaintiffs below, commenced this suit for the recovery of the value of certain money and personal property. The complaint charges that, on November 6, 1907, the appellants were hotel and innkeepers, owning and conducting the Riverside Hotel, in the city of Spokane; that the respondents were guests at such hotel, and had in their possession at such time \$460 in lawful money, one gold watch of the value of \$150, one gold ring of the value of \$25, and one gold ring of the value of \$10, which were kept by them in a small handbag; that on such day the respondents were absent from their room for a few minutes, leaving the handbag with its contents in their room in the hotel; that at the time of leaving their room, the door to the same was closed, and that upon their return to the room, they discovered that the handbag with its contents had been abstracted and stolen.

The answer admitted that the appellants owned and conducted the inn and hotel at the time stated, and that the respondents were guests therein. Issue was joined upon the other averments of the complaint. The appellants pleaded affirmatively, (1) a compliance with the provisions of Bal. Code, § 5977 (P. C. § 5586); (2) that if any loss occurred, it was due to the negligence of the respondents in absenting themselves from their room and leaving their room door unlocked for an unreasonable length of time; (3) that after the loss, if any, occurred, there was a settlement between the appellants and the respondents, whereby the respondents gave appellants their note for \$17 in payment of the rental for

their room. The reply joined issue upon the affirmative matter pleaded in the answer. The case was tried to the court, and terminated in a judgment for the respondents. An appeal was taken from such judgment.

At the threshold of the case the appellants insist that, in cases of this character, a recovery cannot be had on a mere preponderance of evidence, but that the evidence upon which a recovery is authorized must be clear, convincing, and conclusive. *Crapo v. Rockwell*, 94 N. Y. Supp. 1122, is cited as supporting this contention. As we read the case it affords them no aid. The question at issue in that case was whether a woman who had lived in a hotel continuously for some seventeen months was a guest. The court held that the relation of innkeeper and guest did not exist under such circumstances. When the relation of innkeeper and guest and the loss of goods have been established, the true rule is that the innkeeper is *prima facie* liable, and the burden is on him to show such facts as will exonerate him. 22 Cyc. 1082; *Johnson v. Chadbourne Finance Co.*, 89 Minn. 310, 94 N. W. 874, 99 Am. St. 571.

The evidence discloses the following facts: The respondents, a farmer and his wife, sold a tract of land, received therefor something over \$400 in money and a note and mortgage for \$500, and then went to Spokane, primarily to secure treatment for the wife, who was past sixty years of age and in ill health. They became guests in the appellants' hotel on the 19th day of October, 1907, and had a room assigned to them which they continued to occupy until December 2 following. While sustaining the relation of guests at such hotel, they kept this money and the note and mortgage in a small handbag which the wife usually carried when absent from the room. On November 6, the wife was absent from the room for a few minutes, leaving the handbag with its contents on the bed. Upon her return she discovered that it had been taken from her room during her absence. She at once called her husband, who was sitting in the hotel office

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near the room and who had been absent at the same time, and advised him of the loss. A few days later they found the note in the top of their trunk in a closet connected with their room. These are the facts as detailed by the respondents.

There are statements in the record to the effect that, upon the discovery of the loss of the handbag, the respondents, particularly the wife, became quite agitated, and that they each made statements to the effect that the wife had left the handbag at a restaurant in the same building as the hotel. However, the same witnesses who gave this testimony also said that later the respondents claimed that the handbag had been taken from the room. To other witnesses the respondents always asserted that the handbag had been taken from their room in the hotel. The manager of the restaurant, who had seen the respondents come to their meals from day to day and had observed the wife carrying the bag, testified that she did not have it with her when she came into the restaurant the day the goods were taken. Considering the age of the respondents, the wife being past sixty, and the magnitude of the loss as it appeared to them, we do not regard these conflicting statements as serious. The evidence as an entirety is quite conclusive that the bag with its contents was taken from the room of the respondents during their absence, and that only a few minutes intervened between their leaving the room and returning to it at such time. The respondents on December 2, 1907, left the hotel and, in order to get their baggage released, were required to give their note to the appellants for \$17 in payment of the balance due upon their room rent. It is obvious that this did not settle the damages which they had sustained on account of the loss of their property.

The common law rule applicable to these facts is aptly stated in *Crapo v. Rockwell*, *supra*, in which case the court, at page 1123, say:

"The strict rule of the common law has declared for centuries, and still declares, that an innkeeper is the insurer of

the property of his guest, and liable for its loss for any cause whatever, unless such loss occurs from the neglect of the guest or the act of God or the public enemy."

The appellants sought exemption from liability by virtue of the provisions of Bal. Code, § 5977 (P. C. § 5586), which provides:

"No innkeeper who constantly has in his inn an iron safe or suitable vault in good order, and fit for the safe custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones and bullion, and who keeps a copy of this section, printed by itself in large, plain Roman type, and framed, constantly and conspicuously suspended in the office, bar room, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary-sized plain Roman type, posted upon the inside of the entrance door of every public sleeping room of his inn, shall be liable for the loss of any such article suffered by any guest, unless such guest has first offered to deliver such property lost by him to such innkeeper for custody in such iron safe or vault, and such innkeeper has refused or neglected to receive and deposit such property in his safe or vault, and to give such guest a receipt therefor: *Provided*, That all doors to rooms furnished to guests shall be provided with slide-bolts inside of such rooms on all doors; otherwise he shall be liable; but every innkeeper shall be liable for any loss of the above enumerated articles by a guest in his inn, when caused by the theft or negligence of the innkeeper or any of his servants."

The evidence offered by the appellants to bring themselves within this exemption was clearly insufficient. They did not keep or have in their inn an iron or any safe, or a suitable or any vault. The only place they had provided for keeping valuables was a closet in their sleeping room, containing a wooden box. Nor did they post in the sleeping rooms or office a copy of the law which we have quoted, printed by itself. The innkeeper cannot exempt himself from liability except upon a strict compliance with the statute, and the notice required by the statute must be given exactly as provided. 22 Cyc. 1086.

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It follows that the judgment of the lower court is correct, and must be affirmed.

RUDKIN, C. J., MORRIS, FULLERTON, and CHADWICK, JJ.,
concur.

[No. 7977. Department One. June 9, 1909.]

MARK MORRIS, *by his Guardian Ad Litem, Lewis Thomas,*
Respondent, v. NORTHWESTERN IMPROVEMENT
COMPANY, *Appellant.*¹

MASTER AND SERVANT—JOINT TORT FEASORS—JUDGMENT—TRIAL—
VERDICT. In an action against a company and its master mechanic
for personal injuries to an employee, where the only negligence al-
leged was that of the master mechanic in failing in the inspection
of a motor, a verdict exonerating the master mechanic exonerates
the company, and precludes any judgment against either defendant
(Fullerton, J., dissenting).

Appeal from a judgment of the superior court for King
county, Albertson, J., entered November 23, 1908, upon
the verdict of a jury rendered in favor of the plaintiff, in an
action for personal injuries. Reversed.

Carroll B. Graves and *Charles H. Winders*, for appellant.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for re-
spondent.

MORRIS, J.—The plaintiff was in the employ of the defend-
ant company as a motorman, and on the 12th of Novem-
ber, 1906, was injured; the injury being caused by the
breaking of the platform of the motor upon which he stood,
and his right foot being caught in such a way as to bruise
and otherwise injure it. The relation of the defendant Cad-
well to the cause of action pleaded is best understood by
quoting from that portion of the complaint in which the al-

¹Reported in 102 Pac. 402.

legations of negligence, upon which the action is based, are found. Paragraph V:

"That the defendant, Harry Cadwell, was at all times herein mentioned in the employ of the defendant Northwestern Improvement Co., as master mechanic, having charge of the cars, motors and all of the mechanical appliances, fixtures and appurtenances used, possessed and used by said defendant company in the operation of said mines, whose duty it was to inspect, ascertain and know the working condition of all such cars, motors, fixtures and appliances, and to ascertain any and all defects existing in them and each of them, and to see that such defects were remedied and that said motors, cars and appliances were kept in a safe condition and good working order."

Paragraph VII:

"That said defendants on the 12th day of Nov., 1906, so careless and negligent of its and his duty as aforesaid, did furnish to said plaintiff in the performance of his duties a certain motor which was in an unsafe, insecure and defective condition in that the frame work or platform of said motor was not securely and safely bolted or otherwise securely fastened to the trucks of said motor . . . and the said facts were well known to said defendant company and to said master mechanic as aforesaid, and should and ought to have been ascertained by said defendant company and said master mechanic if they had used ordinary care and diligence in the inspection of said motor."

Upon the trial the jury returned this verdict:

"We, the jury in the above entitled cause, do find for the plaintiffs in the sum of ———. It is the intention of this verdict to exonerate the master mechanic—Seven hundred and fifty (\$750.00) vs. the Northwestern Improvement Co."

Both defendants moved for judgment upon the verdict. Defendant Cadwell's motion was granted, and the defendant company's denied, and, upon entry of judgment, it appealed.

Several errors are assigned, but finding one decisive of the appeal, we discuss none other. It is apparent from the complaint as quoted that the only negligence alleged is failure

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to use ordinary care in the inspection of the motor, which duty primarily rested upon defendant Cadwell. There is no allegation of independent negligence on the part of appellant. Its negligence grows out of and follows from the negligence of its master mechanic, in his neglect in the performance of the duty it had intrusted to him. If Cadwell was negligent, then appellant was negligent in law and must answer for the consequent injury; if Cadwell was not negligent, no liability could be imposed upon appellant, because the only negligence upon which its negligence was predicated did not exist. Appellant's relation to the cause of action falls clearly within the rule of *respondeat superior*, and the verdict in favor of Cadwell was, in legal effect, a verdict in its favor, and no judgment against it could be founded thereon. This rule is recognized in the case of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, where the principles and authorities upon which it rests are cited and reviewed. It was again announced in *Stevick v. Northwestern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999. The allegations in the complaint here, and in the above cases, are so nearly identical as to the theory upon which the defendant company is sought to be held, as to make the rule therein announced controlling.

Appellant's motion for judgment should have been granted, and for error in not so ruling, the judgment of the lower court is reversed, and the cause is remanded with instructions to dismiss the action.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

FULLERTON, J., dissents.

[No. 7914. Department One. June 9, 1909.]

MARGERY EBY, *Appellant*, v. JOHN LARKIN *et al.*,
Respondents.¹

APPEAL—REVIEW—RIGHT TO APPEAL—ESTOPPEL. That the appellant, after an announcement of an erroneous conclusion of law therein, duly excepted to, prepared the findings, conclusions, and judgment in accordance with the decision, does not preclude him from appealing therefrom on the theory that he invited the error, having contested the matter all the way.

VENDOR AND PURCHASER—BREACH—REMEDIES OF VENDEE—RECOVERY OF PRICE. Where vendors extended the time of payment of installments on a land contract, of which time was not the essence, so that there was no forfeiture, a vendee is entitled to recover payments made after the vendors have put it out of their power to convey by deeding the land to another.

Appeal by plaintiff from a judgment of the superior court for King county, Gilliam, J., entered December 22, 1908, after a trial on the merits before the court without a jury, upon findings limiting the plaintiff's recovery to \$150, in an action on contract. Reversed and judgment entered for \$350.

L. Y. Devries, for appellant.

M. E. Sheldon, for respondents.

MORRIS, J.—The only question involved on this appeal upon the merits is, Do the findings of fact support the conclusions of law and judgment? The findings of fact and conclusions of law are as follows:

"(1) That on the 27th day of May, 1907, the plaintiff [appellant] Margery Eby, and defendants [respondents] John Larkin and Amanda Larkin, his wife, entered into a certain written contract as follows:

" 'Seattle, May 27, 1907.

" 'Received from Margery Eby the sum of \$200 to apply on contract for the purchase of lots 21, 22, 23, 24, in block

¹Reported in 102 Pac. 236.

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1, in Green Lake Circle Railroad Addition to the City of Seattle, said lots being on the corner of Greenwood Avenue and 67th Street. The full purchase price of said property to be \$2,100, payable as follows: \$200 cash in hand, including the amount of this receipt, and the balance, \$150, July 10, 1907; \$225 on or before Oct. 10, 1907; \$225 on or before Jan. 10, 1908; balance payments as follows: \$300 per year for three years, and four hundred dollars in four years from Jan. 10, 1908; all notes to be made these dates on or before at 7% per annum, with interest on deferred payments at 7% per annum till paid, the same to be secured by first mortgage on the property. The purchaser shall be furnished a complete abstract of the property by the owner, showing good and sufficient title to the said property, and allowed five days for examination thereof; whereupon she agrees to complete the purchase in the manner and upon the terms herein; and that in case of her failure to do so, the said sum of money hereby receipted for shall at the option of the undersigned be forfeited as liquidated damages to the owner. It is further agreed that in the event of failure to convey good and sufficient title within thirty days from date hereof, the said sum of money shall be refunded to the purchaser. Deed to be given any time after \$800 has been paid and abstract furnished.

“Witness our hands in duplicate this 27th day of May, 1907. Bond to be placed in escrow within 10 days from date.

“John Larkin.

“Margery Eby.”

“(2) That by the terms of said contract plaintiff [appellant] bought of the defendants [respondents] and the defendants sold to plaintiff the said lots therein described for the sum of \$2,100, \$200 being paid May 27, 1907, and the further sum of \$150 on July 10, 1907. That the payments provided for in the contract, viz., of Oct. 10, 1907, and Jan. 10, 1908, were not made and plaintiff was given further time to make same.

“(3) That no bond for a deed was ever placed in escrow by defendants nor was any ever tendered or delivered to plaintiff; and that the writing of June 4, 1907, was not a bond for a deed.

“(4) That on February 7, 1908, the following notice was served on plaintiff by defendants' agent:

"To Margery Eby:—

"You are hereby notified that we have, and hereby do elect pursuant to the provisions of our certain real estate contract which you executed on June 4th, 1907, to declare said contract wholly forfeited and determined, and all of your rights and privileges thereunder, as well as the payments which you have made, forfeited, and said payments to be retained by us as liquidated damages for your failure to comply with said contract. That said contract is forfeited and annulled and terminated, by reason of your failure to pay as provided therein, time being of the essence of the contract, the following sums of money, to wit: \$225 on or before Oct. 10, 1907; \$225 on or before Jan. 10, 1908, besides interest, as provided in said contract; that all of your rights to said lots have therefore reverted to us.

"Dated Seattle, Wash., February 6th, 1908.

"John Larkin,

"Amanda Larkin,

"By L. A. Newby, Agent."

"(5) That on February 8, 1908, defendants sold the aforesaid lots to one Herman Reetz without the knowledge of the plaintiff and without her consent.

"(6) That time was not of the essence of the contract.

"Wherefore, as a conclusion of law from the foregoing facts, the court finds that the plaintiff is entitled to judgment for the sum of \$150 and costs of suit, and it is ordered that judgment be entered accordingly."

No exceptions were taken to the findings of fact, but the following exception is noted at the end of the conclusion of law, upon the day of the signing thereof:

"Plaintiff excepts to the conclusion of law in the above case. L. Y. Devries, Atty. for plaintiff."

Upon the announcement by the court of its decision, counsel for the appellant prepared the findings, conclusion of law, and judgment, in accordance with the decision of the court, and submitted them to the court for its signature, giving notice to counsel for respondents of the time when they would be so presented, and upon obtaining the signature of the court thereto, filed the same, and took this appeal.

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Opinion Per MORRIS, J

Respondents now move to dismiss the appeal upon the ground that appellant, having moved the court for judgment upon findings of fact and conclusions of law prepared by herself, cannot complain of error, the error, if any, having been committed upon her own motion; and that having requested the court to so find, respondents were led to believe the findings so requested were satisfactory to her, and being thus lulled into inactivity, took no exceptions to enable them to prosecute a cross-appeal. In support of this contention, respondents cite cases holding that a party cannot obtain reversal of a judgment on appeal for error which he himself has committed, that having requested a given ruling by the court below, he cannot ascribe error to such ruling on appeal.

Conceding such is the proper rule to be applied in a proper case, we do not think it applicable to the situation shown here. Appellant was content with the facts as found by the court; the court had announced its conclusion of law based upon those facts, and appellant could only hope to obtain what she assumed to be a proper conclusion of law and judgment by appeal. She had already submitted the facts to the court, and the court had ruled against her contention. She had a right to have such ruling entered of record in order that she might appeal therefrom. She did not invite the error, if any, of the court. She contested all through the case her right to a larger judgment upon the facts found; but the court ruling otherwise, she did nothing which would deprive her of her appeal by insisting that the record show such a finality as to enable her to prosecute her appeal. Respondents were deprived of no rights in the matter. If the findings were not satisfactory to them, they had opportunity to except and to submit others that were. The fact that a litigant enters a judgment in his favor, in order to appeal therefrom, does not preclude him from questioning the error of that judgment in denying him all the relief claimed by

him. 2 Ency. Plead. & Prac., 157, and cases there cited. The motion to dismiss the appeal is therefore denied.

Coming to the merits: If, as the court below held, plaintiff was entitled to a judgment of \$150, she was entitled to the entire amount paid by her upon the contract. The court finds that respondents breached the contract by voluntarily placing themselves in a position where they could not comply with its terms; that there was no forfeiture, the time for making the payments having been extended. If, by reason thereof, appellant was entitled to recover back the one payment of \$150, by the same process of reasoning she was entitled to recover the other of \$200, and we so hold.

The judgment is reversed, and the cause remanded to the court below with instructions to enter a judgment in favor of plaintiff in the sum of \$350, with legal interest from February 8, 1908, with costs.

RUDKIN, C. J., GOSE, FULLERTON, and CHADWICK, JJ., concur.

[No. 7733. Decided June 10, 1909.]

MATTIS OLSON, *Respondent*, v. C. J. ERICKSON, *Appellant*.¹

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY. The question of the contributory negligence of a servant, acting in an emergency, is for the jury, although when viewed retrospectively, several ways are discernible by which he might have escaped injury if he had had sufficient presence of mind.

MASTER AND SERVANT—VICE PRINCIPALS—SUPERINTENDENCE. A foreman in charge of moving a steam shovel car, whose duty it was to direct when certain acts should be performed by others, is a vice principal, as his duties are those of superintendence which are non-delegable.

MASTER AND SERVANT—SAFE APPLIANCES AND PLACES—DUTY—INSTRUCTIONS. It is proper to instruct that a master owes the positive duty to his servants to use reasonably safe appliances and to use reasonable care to provide a reasonably safe place to work.

¹Reported in 102 Pac. 400.

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Opinion Per FULLERTON, J.

DAMAGES—EVIDENCE—HOSPITAL AND MEDICAL SERVICES—INSTRUCTIONS. In an action for personal injuries it is error to give instructions allowing recovery for hospital services and medical attendance merely upon evidence that plaintiff had been in a hospital and been attended by a physician.

APPEAL—DECISION—REMISSION TO AVOID ERROR. Upon appeal from a judgment for personal injuries for error in submitting an item of \$194 for hospital services and medical attendance, the judgment will be affirmed if such item is remitted by the respondent.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 10, 1908, upon the verdict of a jury rendered in favor of the plaintiff for \$2,000, in an action for personal injuries sustained by an employee about a steam shovel. Reversed, and a new trial ordered unless \$194 is remitted.

Carl J. Smith and Frank C. Park, for appellant.

Brightman & Tennant, for respondent.

FULLERTON, J.—The respondent brought this action against the appellant to recover for personal injuries received by him while in the appellant's employment. The jury returned a verdict in his favor for the sum of \$2,000. Judgment was entered on the verdict, and this appeal was taken therefrom.

At the time of the accident to the respondent, the appellant was excavating a street in the city of Seattle with a steam shovel. The engine and other mechanism by which the shovel was operated was carried on a car placed on trucks running on rails, similar to the trucks and rails of an ordinary railway. The scoop, or shovel itself, was arranged to operate in front of the car. The method of operation was to lay a track in front of the body of earth it was desired to remove, excavate everything within reach of the scoop, and then extend the track over the excavated portion, move the car up against the bank, and repeat the process. The engine operating the scoop was connected with the trucks by means of chains fastened to the axles. By exerting pressure on these

chains the car could be moved for short distances either way by means of its own power. At the place of the accident to the respondent the grade was somewhat steep, with the car on the upper side of the grade. The car was held in place while the scoop was being operated by blocks laid across the rails in front of the wheels of the trucks and fastened to the rails by means of clamps. When it was desired to move the car, pressure on the blocks would be removed by means of the engine. The workmen would then loosen the clamp, move the block back the required distance and fasten it with the clamp, when the car would be let down slowly by the engineer into the new position. The work was done under the direction of a foreman. It was his duty to observe the conditions and give the order for moving the blocks, and the order to the engineer to let the car down at the proper times. It was customary also for the engineer to give a signal just before moving the car. It was a part of the respondent's duty to move one of these blocks. At the time he received the injury, the strain was taken off the blocks by the engineer and he was signalled to move the block back. He obeyed the signal and was in the act of moving the block to the required place when the car, without the customary signal being given, and before he succeeded in getting the block in position to clamp, was suddenly moved towards him. In his effort to get out of the way, he was caught by an iron brace extending from the car and pinned by it to the ground, receiving the injuries for which he sues.

The appellant first assigns that the court erred in refusing to grant a nonsuit on the ground of contributory negligence on the part of the respondent. It is argued that the respondent brought the danger upon himself by the unskillful manner in which he performed his work, and a number of acts of commission and omission on his part are pointed out which it is asserted contributed to his injury. But the appellant is viewing the accident retrospectively. It is an easy matter, after an accident happens, to discern ways by which it could have

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Opinion Per FULLERTON, J.

been prevented or avoided, and ways by which its victim could have avoided injury had he but had the presence of mind to have pursued them. The injured person's right to recover, however, is not measured by these tests. He is not to be found guilty of contributory negligence merely because there were ways of escape open to him which he could have pursued. The test is did he act as a reasonably prudent person would have acted under similar circumstances; and this question is usually one for the jury and not the court. It was so in the present case. From the record, as we read it, we cannot say, as a matter of law, that the defendant did not act with reasonable prudence. It may be that we would hold that he did not so act were the question one for us to determine from the preponderance of the evidence, but since it is one on which reasonable minds might reasonably differ, it was for the jury, and their finding is conclusive upon us.

It is next contended that the foreman in charge of the work and who directed its different operations was a fellow servant of the respondent, and hence the master is not liable, even though it be conceded that the injury was the result of the negligence of the foreman. But we think that the foreman was a vice principal standing in the place of the master, and not a fellow servant of the respondent. The work of moving the car consisted of several correlated parts, each part being required to be performed at a particular time and in a particular manner. There could not be the necessary unison among the workmen to accomplish the result desired without the immediate superintendence of some person having authority to give the necessary directions. And inasmuch as it was a work that required superintendence, we hold that the duty of superintendence devolved upon the master, and that the master therefore owed to each of the servants the duty of proper superintendence, and is responsible to any one of them who is injured because of a negligent performance of that duty. We are aware that this rule does not obtain in all jurisdictions. There are cases which hold the master liable, under

like circumstances, only where it is shown that he selected for the duty of superintending the work a careless, negligent or incompetent person, knowing him to be such. But we have followed the cases holding the duty of superintendence to be the primary duty of the master, nondelegable to a superintendent or foreman, and this rule requires the master to answer for any negligent performance of the duty. *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 276; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326.

The court gave the jury the following instruction which was excepted to as error:

"You are instructed that the master or employer owes a positive duty to his servant or employee to use reasonably safe appliances and instrumentalities for the use of his employee in prosecuting the work undertaken, and to use reasonable care to provide a reasonably safe place for the servants to work in, and to maintain it in a reasonably safe condition."

This instruction finds support in the case of *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334, and is a correct statement of the law.

The court further instructed the jury as follows:

"If under the evidence and the instructions of the court you believe that plaintiff is entitled to recover for his injuries, then in assessing the damages to be allowed him you may take into consideration . . . any indebtedness incurred by the plaintiff for medical or surgical attendance, hospital services and nursing not exceeding the sum of \$44 for hospital services and nursing and \$150 for medical attendance and services."

This instruction was erroneous. There was no evidence introduced tending to show that any liability had been incurred for either hospital services or medical attendance. It

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Opinion Per FULLETON, J.

appeared incidentally that the respondent had been in a hospital and had been attended by a physician, but whether he incurred any liability for the services or whether they had any greater value than a nominal value, the evidence is silent. There was nothing, therefore, on which the jury could base a finding against the appellant for the amount of these items. The cases of *Webster v. Seattle, Renton etc. R. Co.*, 42 Wash. 364, 85 Pac. 2; *Cole v. Seattle, Renton etc. R. Co.*, 42 Wash. 462, 85 Pac. 3; and *Niemyer v. Washington Water Power Co.*, 45 Wash. 170, 88 Pac. 103, relied upon by the respondent, do not support this instruction. In the first two of these cases, there was some evidence tending to show the value of the services, and in the third the court instructed that they might allow the plaintiff his expenses for medical services if they found any such had been incurred, leaving it for the jury to determine not only the value of the services, but whether or not there was any evidence showing the value of the services. In the case at bar, the court assumes that there was evidence before the jury justifying a finding in favor of the respondent on these items in the sum of \$194. This was not the fact.

Lastly, it is contended that the verdict is excessive, but without entering into an analysis of the evidence, it is sufficient to say that we have examined it and do not find any warrant to interfere on that ground.

For the error noticed, the judgment must be reversed. A new trial, however, need not follow as of course. If the respondent will, within twenty days after the cause is remanded, consent in writing to take a judgment for the amount of the verdict less \$194, then a new judgment may be entered in his favor for that sum; otherwise a new trial will be awarded. Appellant will recover his costs.

ALL CONCUR.

[No. 7817. Decided June 10, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK H.
PILLING, *Appellant*.¹

FORGERY—EVIDENCE—SUFFICIENCY. In a prosecution for issuing a check on a bank without funds to meet it, confessions of the accused and the evidence of the officer of the bank are sufficient to make a case for the jury on the question of the existence of funds in the bank.

FORGERY—ELEMENTS OF OFFENSE—VARIANCE—NAME OF PARTY DEFENDANT—SURPLUSAGE. Technical ownership of money paid out by a bank over its counter is not material in a prosecution under Laws 1905, p. 78, defining the essential elements of an offense as the drawing of a check on a bank for the payment of money, knowledge at the time that the drawer was without funds therein or credit, and intent to defraud; and a variance as to the ownership is immaterial, especially in view of Bal. Code, § 7132, providing that the name of the party defrauded need not be given, as the same would be surplusage.

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—FORGERY. Laws 1905, p. 78, making it a felony to issue a check on a bank without funds or credit to meet it, with intent to defraud, is not unconstitutional as authorizing imprisonment for debt.

FORGERY—INTENT TO DEFRAUD—INSTRUCTIONS—BURDEN OF PROOF. In a prosecution for issuing a check upon a bank without funds therein or credit to meet it, with intent to defraud, under Laws 1905, p. 78, it is error to instruct that the law would presume intent to defraud from the issuing of a check knowing that the accused had no funds or credit to meet its payment; since it was at least only a rebuttable presumption, and the most that the court could do would be to leave it to the jury to infer the fraud, the burden of proof of which was upon the state (Mount, Crow, and Dunbar, JJ., dissenting).

SAME—APPEAL—REVIEW. Such an instruction would not be cured by other general instructions disassociated therefrom.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered October 24, 1908, upon a trial and conviction of the crime of drawing upon a bank without funds wherewith to meet the check. Reversed.

¹Reported in 102 Pac. 230.

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Opinion Per RUDKIN, C. J.

Walter M. Harvey, for appellant.

H. G. Rowland and Robert M. Davis, for respondent.

RUDKIN, C. J.—On the 1st day of August, 1908, the defendant, Pilling, drew a check on the Daly Bank & Trust Company of Butte, Montana, in favor of James R. Thompson for the sum of \$18,000, and delivered the same to the payee therein named. Thompson endorsed and delivered the check to the Scandinavian-American Bank of Tacoma, Washington, and the latter institution cashed the check and delivered the proceeds to Pilling or Thompson, Pilling ultimately receiving the money. The check was not paid on presentation, and an information was thereupon filed against the defendant under § 1 of the act of March 2, 1905, Laws of 1905, p. 78, which reads as follows:

“Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of a felony,” etc.

Trial was had before a jury, and from a judgment pronounced upon a verdict of guilty, this appeal is prosecuted.

The denial of a challenge for cause, interposed to one of the jurors by the appellant, is assigned as error, but a new trial must be awarded on other grounds, and inasmuch as this question will not arise on a retrial, in the same form at least, we deem it unnecessary to discuss or consider it.

It is next contended that the court erred in denying a motion to dismiss, interposed at the close of the state's case, on the following grounds: (1) Because the state failed to prove that the appellant had not sufficient funds or credit in the bank to meet the check on its presentation; (2) because there was a variance between the allegations and the proofs in this; whereas the information charged that the appellant re-

ceived the money and property of the prosecuting witness Thompson with intent to defraud him, the proof showed that the money received was the money and property of the Scandinavian-American Bank, and that the bank was the party defrauded; (3) because the act under which the information was filed is unconstitutional.

(1) The admissions or confessions of the appellant, coupled with the evidence of the officer of the bank upon which the check was drawn, was sufficient evidence to carry the case to the jury on the question of the existence of funds or credit to meet the check on its presentation.

(2) The essential elements of the crime defined by the statute are three: first, the drawing of a check on a bank or other depository for the payment of money; second, knowledge at the time of drawing the check that the drawer has not sufficient funds in, or credit with, the bank or depository to meet the check in full upon its presentation; and third, an intent to defraud. Under this statute the technical ownership of the money paid out by the bank over its counter was not material. The material question was the intent to defraud. The proof showed that the prosecuting witness was compelled to, and did, repay the money to the bank by reason of his endorsement, and that he was the party in fact defrauded. But aside from this, Bal. Code, § 7132 (P. C. § 1665), provides that,

“In any case where the intent to defraud is necessary to constitute the offense of forgery or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment or information an intent to defraud without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment it shall be deemed sufficient, and shall not be deemed a variance if there appear to be an intent to defraud the United States, or any state, territory, county, city, town, or village, or any body corporate, or any public officer in his official capacity, or any copartnership, or any member thereof, or any particular person; and persons of skill shall be competent witnesses to prove a forgery.”

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Opinion Per RUDKIN, C. J.

Under this section the naming of the person intended to be defrauded is immaterial and may be treated as surplusage, and, if the appellant intended to defraud the Scandinavian-American Bank as claimed, such proof sustains the charge and does not constitute a variance.

(3) The contention that the statute authorizes imprisonment for debt, in violation of § 17 of article 1 of the state constitution, is not well founded. The statute punishes the party for his fraud and not for his failure to redeem his check. *In re Milecke*, 52 Wash. 312, 100 Pac. 743.

After the jury had retired to consider of their verdict, they returned into court and asked the following question:

"We wish to know a little more about the intent to defraud. If a man issues a check on a bank, knowing at the time of the issuance of the check that there is not sufficient funds or credit in the bank to meet the check, would that be considered intent to defraud?"

To this inquiry the court replied:

"I think if a man issues a check upon a bank where he has no funds to meet the check, and no credit in the bank to meet the check, and obtains anything of value upon the check, the law would presume that an intent to defraud."

This instruction was excepted to and is assigned as error. The exception must be sustained. As already stated, there are three constituent elements in the statutory definition of the crime charged. The question propounded to the court would indicate that the jury had already resolved two of these against the appellant, and the court, by the charge complained of, determined the third and more important one against the appellant as a matter of law. There are two classes of legal presumptions, conclusive and rebuttable. Against the former no kind of testimony however strong will prevail, while presumptions of the second class are equally conclusive until overcome by proof. If this instruction did not withdraw the question of intent from the consideration of the jury entirely, it at least cast the burden of proof upon

the appellant, and in either view the instruction was erroneous. To say that fraudulent intent is presumed and that innocence is likewise presumed is a legal solecism. Furthermore, fraud is never presumed, even in a civil action. The utmost that the court could have said under the circumstances would be to have informed the jury that they might infer the intent to defraud from all the facts and circumstances in the case. It will perhaps be argued that this was the legal effect of the court's language, but we cannot so construe it. The jury were given to understand that they must accept the law from the court, and when the court informed them that the law presumed guilt from the facts stated they might well conclude, and perhaps did conclude, that a verdict of guilty was the only alternative. The language of the court was free from ambiguity, and we must assume that the jury understood and construed it according to its plain and natural import. Nor was this error cured by anything contained in the general charge of the court. The instruction was dissociated from the rest, and the very fact that the jury desired further instructions would indicate that they did not understand or remember the charge already given.

For this error the judgment is reversed, with directions to grant a new trial.

FULLERTON, GOSE, CHADWICK, MORRIS, and PARKER, JJ., concur.

MOUNT, J. (dissenting).—I cannot agree that the answer of the court to the question of the jury was reversible error. The jury simply desired to know how they were to find the intention of defendant, and for that purpose asked the court: "If a man issues a check on the bank, knowing at the time of the issue of the check that there was not sufficient funds or credit in the bank to meet the check, would that be considered intent to defraud?" If the court had simply answered this question in the affirmative, the answer would clearly have been correct, because the question covers all the

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Dissenting Opinion Per MOUNT, J.

essential elements of the crime as defined by statute, except the intent to defraud. Intent must necessarily be inferred from the facts stated. It is seldom that a man orally declares his intention, especially where it is a criminal one. Such intention must be presumed or found from the acts done. Otherwise few crimes could be proven. It is true the court did not answer the question directly in the affirmative. If the answer stood alone it would be erroneous, because it omitted the essential element of knowledge that the drawer had no funds in the bank, but the answer was plainly given with reference to the facts stated in the question, and in substance was an affirmative answer. The whole question and answer must be construed together and not independently. It will not do to eliminate the question which called forth the answer. It is plain that the jury had already determined the facts stated in the question, which included knowledge that appellant had no credit at the bank, and they desired to know if from those facts they might deduce an intention to defraud, and the effect of the answer, when considered in the light of the question, was that they might do so. The jury plainly could not have been misled to believe that the element of knowledge was not necessary to be found by them. The answer to the question was, therefore, not prejudicial error. The effect of the majority opinion is to place a technical construction upon the answer without reference to the question asked, and to assume that the jury was misled thereby when it plainly appears otherwise.

In my opinion, the judgment should be affirmed.

CROW and DUNBAR, JJ., concur with MOUNT, J.

[No. 7475. Decided June 11, 1909.]

SOUND INVESTMENT COMPANY, *Respondent*, v. BELLINGHAM BAY LAND COMPANY, *Appellant*.¹

APPEAL—DECISION—PROCEEDINGS ON RETRIAL—TAXATION—FORECLOSURE. Where, upon reversal of a tax foreclosure, the supreme court directs a determination of the proper portion of taxes to be borne by each of several lots assessed *in solido*, on a retrial, the value of each lot is to be determined by evidence and the tax apportioned among them, with statutory interest.

TAXATION—FORECLOSURE—DEFENSES—ANSWER—ESTOPPEL. In an action to foreclose a tax lien, an answer pleading the existence of a certain lot precludes the claim that there was no such lot.

APPEAL—REVIEW—HARMLESS ERROR. A tax foreclosure judgment against a lot not in existence is without prejudice to the defendant.

SAME—TRIVIAL AMOUNT. Error in assessing cost of 50 cents for a delinquency certificate falls within the principal *de minimis non curat lex*.

TAXATION—FORECLOSURE—COSTS—PERSONAL JUDGMENT. In a tax foreclosure suit, personal judgment should not be entered for costs.

Appeal from a judgment of the superior court for Whatcom county, Joiner, J., entered March 10, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a tax lien. Affirmed.

Black, Kindall & Kenyon and *Dorr & Hadley*, for appellant.

Fairchild & Bruce and *Newman & Howard*, for respondent.

CROW, J.—This action, which was commenced by Sound Investment Company, a corporation, against Bellingham Bay Land Company, a corporation, and other defendants, to foreclose a delinquent tax certificate, has heretofore been in this court. A statement of the case and its issues may be found in our former opinion, 45 Wash. 636, 88 Pac. 1117. When the action was called for a retrial, some question arose in the

¹Reported in 102 Pac. 234.

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Opinion Per CROW, J.

superior court as to an interpretation of the instructions contained in our former opinion, reading as follows:

"The case is reversed and remanded with the following instructions: Either side may request the trial court to make a finding as to what would be the just and reasonable amount of tax to be borne by each one of these lots for the years during which they were assessed in bulk. When these amounts are ascertained and adjudged by the court, the appellant shall be given a reasonable time by the court within which to redeem the property by paying the taxes, penalties, interests, and costs for the years when the property was assessed separately, together with the amount found by the court to be justly and legally chargeable against said lots for the other years, together with interest, penalties, and costs."

Preliminary to the introduction of evidence, the trial judge, after argument of counsel, in passing upon this question, said:

"It seems to me as though the language of the supreme court here was perhaps plain enough. I don't know wherein the counsel misunderstands this, but my understanding of it is, that practically all there is for us to do is to apportion the assessment which has been made between these lots involved in the case."

Afterwards, in sustaining an objection to evidence offered by the defendant, he further said:

"I am going to try this, as the supreme court directs, to adjust this assessment so that each lot will bear its just proportionate part of the assessment which is placed upon it in bulk."

All competent evidence admitted on the former trial was upon stipulation of the parties again admitted, with additional evidence offered to show the segregated values of the sixteen separate lots in block 25, which had been assessed *in solido*. The trial court made findings in which he fixed the value of each lot for the years 1902, 1903, and 1904, and determined the delinquent taxes separately assessed against them, together with statutory interest thereon. Judgment

was entered foreclosing the certificate of delinquency against the different lots for such several items of delinquent taxes and interest, the lien on lot 1 being for \$8.19, and other amounts being decreed against each of the other lots for the delinquencies severally stated in the findings. The defendant Bellingham Bay Land Company has appealed.

The appellant has presented numerous assignments of error, most of them involving questions determined in our former opinion, now the law of this case. We can only consider such new questions as arose on the second trial. The effect of our former opinion was not to declare void the taxes and assessments for the years 1902, 1903, and 1904, which had been made on the lots *in solido*, as upon a single tract. We then said:

“While it might perhaps be held in some cases that an assessment *in solido* was void, we are inclined to treat the one involved in this proceeding as valid to the extent of the just tax which should be borne by each of these lots. In other words, we think this tax roll was incompetent to establish the *amount* of tax due against each of these lots for the years wherein the sixteen lots were assessed in bulk. It was, however, competent to show that the property was assessed and a tax levied against it, but in an irregular and erroneous manner. . . . The appellant when it appeared in this proceeding, in addition to the tender which it made, should also have requested the court to determine the amount of taxes justly due upon each of said lots for the years wherein they were assessed *in solido*, and offered to pay such amount as should be ascertained to be legally and justly due on account thereof. Thereupon the court should have granted it permission to redeem by paying the amount so found to be rightfully due. Whether the tax shown by the tax roll upon the lots for the years when assessed in a group be held to be correct in amount or otherwise, it is certain that the property was taxable for those years, and that said taxes are chargeable against the property; and when the matter came before the court, as it did in this proceeding, it was the duty of all the parties interested to see that the tax was properly distributed.”

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Opinion Per Crow, J.

In view of this language and our former instructions to the trial court, we hold the conclusions of the trial judge as to procedure on the second hearing to have been correct, and that he did proceed properly in ascertaining the separate value of each lot, and in making a just apportionment of the tax.

The appellant contends that the trial court committed error in its rulings on evidence admitted and rejected. This assignment is urged upon the theory that the procedure adopted by the trial judge in ascertaining the value of the several lots and in making the apportionment of taxes was erroneous, but as we hold such proceedings to have been legal and proper, the appellant's contentions based thereon must fail.

An order of foreclosure was entered against lot 16, for its separate apportionment of the total tax and interest amounting to \$2.27. The appellant now contends that the evidence shows there was no lot 16 in block 25, and insists that the trial court erred in entering judgment of foreclosure thereon. The allegations of appellant's answer, by which it pleads the existence of lot 16, precludes it from making any such contention. In any event, if no such lot exists, a sale thereof will not prejudice the appellant.

Statutory interest was allowed on the delinquent taxes for all years named in the certificate, including the taxes for 1902, 1903, and 1904, and the appellant now contends that such allowance was erroneous. This award was in compliance with the instructions of this court, and is approved.

In the final judgment costs were taxed against appellant for:

Issuance of certificate of delinquency.....	\$.50
Clerk's fees, filing application for foreclosure	2.00
Sheriff's fees, serving summons.....	1.20
2 witnesses on second trial.....	4.40
Total	\$8.10

The appellant now contends that the trial court erred: (1) in awarding these costs to the respondent; and (2) in entering a personal judgment therefor. The maxim *De minimis non curat lex*, ought to be applied to this assignment. The item of fifty cents taxed for the delinquency certificate, if not court costs, could have been apportioned ratably to each lot. No personal judgment should be entered in a case of this character, but all costs properly taxable might have been apportioned to the several lots, and decreed to be liens thereon. In our former opinion we directed that each party pay its own costs, manifestly referring to such costs as had been incurred during the progress of the first trial, and not to sheriff's or clerk's fees, incurred prior thereto, nor to subsequent costs such as witness fees, which might be incurred on the second trial. This objection to costs is too trivial to demand our serious consideration, but if the appellant so desires, it may on its motion to be made within ten days after the filing of the remittitur herein, have the personal judgment for costs vacated, and an order entered apportioning one-sixteenth of the certificate fee and the costs to each of the lots as additional liens thereon. With this privilege to appellant, the judgment is affirmed. The respondent will recover its costs on this appeal.

RUDKIN, C. J., MOUNT, DUNBAR, and FULLERTON, JJ., concur.

MORRIS, GOSE, PARKER, and CHADWICK, JJ., took no part.

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Statement of Case.

[No. 7636. Decided June 11, 1909.]

THOMAS MERCEREAU, *a Minor, by his Guardian Ad Litem,*
MATILDA MERCEREAU, *Respondent,* v. MAUGHLIN
MILL COMPANY, *Appellant.*¹

MASTER AND SERVANT—NEGLIGENCE OF MASTER—SIGNALS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of a mill company in starting up the mill without giving the customary signal, and the contributory negligence of the operator of a rip saw, a boy seventeen years of age, in not throwing the saw out of gear by means of an idler, are questions for the jury, where it appears that a signal was given to stop the mill, and upon its stopping completely, the plaintiff undertook to remove a stick lodged in the conveyor, and that the mill suddenly started up whereby plaintiff's hand was cut and mangled, and that it was customary to give two blasts of the whistle before starting up the machinery.

SAME—DUTIES OF SERVANT—EVIDENCE—SUFFICIENCY. In an action for injuries sustained by an employee while cleaning out a conveyor from a rip saw, there is sufficient evidence that he was engaged in the line of his duties, and that there was necessity to remove a lodged stick, where it appears that he had been told to keep the conveyor clean and the inference from the testimony was that he had received these instructions from the foreman.

JURY—IMPANELING—DRAWING BY CLERK. Where, in drawing a jury, the usual practice is followed, the ballots are taken from the box by chance, and an impartial jury results, error cannot be predicated on the manner in which the clerk conducted the drawing when selecting the jury, the statute not being clear as to the exact method of drawing.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 1, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the operator of a rip saw. Affirmed.

R. S. Eskridge, Philip Tindall, and Brownell & Coleman,
for appellant.

Hathaway & Alston, for respondent.

¹Reported in 102 Pac. 232.

FULLERTON, J.—This is an action for personal injuries. The appellant is engaged in the business of manufacturing lumber. It employed the respondent, who was at that time just past his seventeenth year, to assist in operating a rotary rip saw. This is a saw set in a frame resembling somewhat an ordinary edger, differing therefrom chiefly in the fact that it has but one saw on the arbor. Immediately under this particular saw was a conveyor, consisting of an endless chain with crosspieces fastened thereto, its use being to carry away the sawdust and other refuse that fell from the saw. In the forenoon of the day of the accident to the respondent, the respondent with one Sinclair had been engaged in ripping lumber on this saw. After completing the work Sinclair left for another part of the mill, and the respondent started to clean up the refuse that had gathered around the rip saw while it was in operation. As the respondent was engaged in this work, the signal was given for stopping the mill, when it immediately slowed down, and, as the respondent testified, stopped completely. At this juncture the respondent observed a stick lodged in the conveyor immediately under the rip saw. He reached for it and was in the act of removing it when the mill suddenly started without the usual warning, catching his hand on the rip saw, and cutting and mangling it so badly that the surgeons found it necessary to amputate it above the wrist.

The machine was fitted with a belt tightener in the form of an idler pulley, so that the saw could be stopped while the main machinery of the mill remained in motion. The saw itself had no guard of any kind, although it was testified that it could have been guarded, without interfering with its efficiency, so as to prevent accidents of the kind here in question.

The respondent testified also, a matter that seems not to be disputed, that it was customary in this mill to give warning by two blasts of the whistle whenever the mill was started in motion after having been stopped, no matter for what cause,

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and that this warning was not given at this particular time. The following also appears in the respondent's direct examination:

"Q. Then it was the custom to take sawdust and sticks and things from the edger and carry it to the big elevator? A. Yes, sir. Q. Where was the big elevator? A. Right off the main saw. Q. How far from the edger? A. About twenty-two feet. Q. And while you were doing that you noticed this particular piece that you have described on the elevator in the edger? A. Yes, sir. Q. Did you say that you caught hold of that stick, or not? A. I just put my hand in on top to get it. Q. And what happened then? A. The machine started up and I pulled to get out and it was cut off. Q. How tall are you, do you know? A. No, sir; not—I don't know just how tall I am. Q. Your arms are unusually long for a boy of your age? A. Yes, sir, they are pretty long. Q. You weighed how much at the time of the accident? A. One hundred and sixty. Q. Had anybody ever shown you how to clean out under there? A. No, sir. Q. You had been told to keep that clean? A. Yes, sir. Q. But you were never told anything about whether it was dangerous and any particular way in which to do this work? A. No, sir."

The appellant's first contention is that the respondent was guilty of contributory negligence. It is said that before putting his hand under the saw he should have removed the idler so that the saw would have remained motionless even though the remaining mill machinery was put in motion. But it was for the jury to say whether under the circumstances the respondent had a right to rely on the fact that the customary signal would be given before the mill was started in motion. Had the usual signal been given, and had the respondent failed to get his hand away in time, then the risk would have been his own, but when he introduced evidence tending to show the custom of the mill as to giving warning before the machinery was started in motion, and that no warning was given in this instance, it became a question for the jury to say whether it was negligence on the part of the appellant to start the mill without giving the warning at this

particular time, and whether the failure of the respondent to remove the idler was, in view of the circumstances, such negligence as barred his right to recover. The cases of *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Johnson v. Anderson etc. Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Bailey v. Mukiltæo Lumber Co.*, 44 Wash. 581, 87 Pac. 819, and *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881, and the kindred cases cited by the appellant, do not sustain the contention it makes here. These were cases where the employee had a choice of ways in which to do his work, and voluntarily chose the unsafe way. In the case at bar, the method chosen to do the work was not in itself unsafe. It became unsafe because of the appellant's negligence in starting the machinery of the mill in motion without giving the customary warning, and the respondent owed no duty to protect himself against the negligence of the appellant—at least, these were questions for the determination of the jury, and should not be decided by the court as questions of law.

It is next insisted that the respondent's case is defective in the particular that no evidence was introduced tending to show that there was any occasion, "either by virtue of the general nature of his duties or as the result of any specific order," for the respondent to attempt to clean the conveyor under the saw. But this we think is refuted by the testimony of the respondent we have quoted from the record. It is true the examiner led the witness in a manner not to be commended on direct examination, but the witness does say that he had been told to clean out and keep clean the conveyor under the saw, and was not instructed as to any particular manner in which to do the work. Nor does he say in this connection by whom he was directed to clean out the conveyor, but earlier in his examination he had said he was put to work by the foreman of the mill company and received directions from him, and it is reasonably inferable, at least, that he referred to the foreman as the source from which he received his in-

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structions. It is true, also, that he is contradicted in his statements on this point, but the jury had the right to believe either party, and since they found in favor of the respondent, this court must accept as true that version of the evidence which supports the finding.

Counsel argue further, that it was not made to appear that there was any necessity for the respondent to remove the stick; that it was not shown to be interfering at all with the operation of either the saw or the conveyor, or that it would not have been carried away as soon as the conveyor was put in motion; in fine, there was no reason why he might not have left it where it was. But the respondent was directed, if his evidence is to be believed, to keep the conveyor clean under the saw. This must mean clean from refuse material apparently lodged there as well as that actually so lodged. He cannot be held guilty of contributory negligence merely because he did not discriminate nicely in this respect.

It is assigned that the court erred in not discharging the jury on the appellant's motion made at the beginning of the trial. This motion was based on the manner in which the clerk conducted the drawing when selecting the jury. We have perused the evidence on this point with care, and are unable to discover that the clerk departed from the usual practice in this regard. The ballots were taken from the box by chance, and an impartial jury resulted. While the statute is not clear as to the exact method to be pursued, its purpose is to provide for a chance drawing from the box, and since this was accomplished, no prejudice resulted to the appellant.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, GOSE, and CROW, JJ.,
concur.

[No. 7629. Department One. June 11, 1909.]

ROBERT KATH, *Appellant*, v. S. L. BROWN, *Respondent*,
HISTOGENETIC MEDICINE COMPANY, *Intervener*
and *Respondent*.¹

APPEAL—DECISION—EFFECT—JUDGMENT—VACATION. After a judgment has been affirmed on appeal, the superior court has no jurisdiction of an action to vacate it for fraud, the supreme court not having granted leave to attack it.

Appeal from a judgment of the superior court for King county, Morris, J., entered May 6, 1908, denying a petition to vacate a judgment for fraud, after a trial on the merits before the court. Affirmed.

Bevington & Finch, for appellant.

Jay C. Allen, for intervener.

CHADWICK, J.—On the 17th day of December, 1906, a judgment was rendered by Honorable William R. Bell, acting as judge *pro tempore*, in an action wherein appellant was plaintiff and S. L. Brown was defendant, and the Histo-genetic Medicine Company, a corporation, was intervener. The decision of the judge *pro tempore* was adverse to plaintiff. A motion for a new trial supported by affidavits was introduced. We do not find the motion for a new trial or the affidavits in support thereof in the record, but the breadth of the motion can be measured by the order of the court entered on the 29th day of December, 1906, which is as follows:

“Be it remembered that the above entitled matter came on regularly for hearing on the 29th day of December, 1906, upon the motion of the plaintiff for an order vacating the judgment and decree heretofore entered herein and for a new trial, plaintiff appearing by his attorneys, and intervener appearing by its attorney Jay C. Allen, and the court considering the affidavits filed in support of said motion, and after argument of counsel and being fully advised in the law and

¹Reported in 102 Pac. 424.

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the premises, does deny said motion, to which order and ruling plaintiff excepts and an exception is allowed."

An appeal was prosecuted from that judgment to this court. Thereafter a motion supported by affidavit, showing the appeal to have been abandoned, was entertained by this court, and a judgment affirming the judgment of the court below was entered. A remittitur went down on the 8th day of July, 1907. On the 20th day of July following, appellant, who was plaintiff in the first instance, as he is now, filed his petition in the court below to vacate the judgment originally entered, upon grounds sounding in fraud and conspiracy between his attorney, the intervener, and others who had been connected with the transaction attending the transmission of title from appellant to the respondent. This petition came on regularly to be heard before the Honorable George E. Morris, then a superior judge of King county, who evidently tried the full merits of the original controversy between the parties, as well as the charges of fraud and conspiracy. We are aware that it is the contention of the appellant that this is not so, but the record hardly bears out his contention. Evidence upon every issue was tendered by the appellant and challenged by respondent, witnesses impeached, and characters assailed. All documents and records having any possible, even remote, bearing upon the differences existing between the parties were introduced, and the ruling of the court, which is made a part of the transcript, clearly shows that he decided the case as if upon the merits and finally.

While in *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103, we held that it was not necessary or within the contemplation of the law for a court to try out the merits of a case upon petition to vacate a judgment, but rather to determine the probability of merit, we have deemed it not improper to make these observations to show that, were we to enter into a discussion of the facts, it would involve the repetition of a trial already twice had and twice determined. Admitting merely

for the sake of argument that the two learned judges who have decided against appellant were wrong in their conclusions, he is nevertheless met by a proposition of law which not only bars us of our inclination to review the testimony in this opinion, but precludes his recovery. The trial judge had no jurisdiction to entertain the petition now before us. When the judgment of this court affirming the judgment of the judge *pro tempore* was remitted to the lower court, it became in legal effect conclusive upon all the parties to the action in that court, unless recalled or attacked by permission first obtained upon proper showing here. This was not done. Immediately following the remittitur, the petition was filed. In *Post v. Spokane*, 28 Wash. 701, 69 Pac. 371, 1104, the court said:

“Upon satisfactory showing being made in this court, leave has been granted in some instances to attack judgments which have been affirmed here. We are not, however, aware of any published decision which shows such leave to have been granted. It is manifest that this court must reserve to itself the right to determine each particular case from the showing made, and no general rule can be announced as applicable to all cases. Certainly no permission can be granted to disturb the judgments affirmed or entered by this court unless it is made reasonably to appear that the ends of justice require it. But the precedent of entertaining and considering such applications has already been established. Since our published reports contain nothing upon this subject, as far as we are now informed, we have thought it proper to make these observations in this connection, in order that the precedent established may be more generally understood.”

See, also, *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740, and *Post v. Spokane*, 35 Wash. 114, 76 Pac. 510. This rule, as will be conceded, is a rule of necessity. Otherwise the judgments of this court would not be final, but the objects of attack at will.

Appellant had his day in court, and cannot be heard further. While it is our boast that the courts of our country

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are always open, it does not follow that they are open always. There must be an end of litigation over a given subject-matter. The court below being without jurisdiction, it follows that there is no controversy before us of which we can take cognizance.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur.

MORRIS, J., took no part.

[No. 7705. Department One. June 11, 1909.]

P. G. GLEASON, *Appellant*, v. D. M. OWENS *et al.*,
Respondents.¹

TAXATION—FORECLOSURE AND SALE—DEFENSES—EFFORT TO PAY—MISTAKE OF OFFICER. Efforts of the owner in good faith to pay taxes before delinquency, which were prevented by mistake of the county treasurer in informing him that the taxes were paid, are equivalent to payment, rendering a tax sale therefor void.

TAXATION—REDEMPTION—PAYMENT INTO COURT—JUDGMENT VACATING SALE. Failure to require repayment of a tax, in a judgment setting aside the tax sale, is immaterial where, prior to entry of the judgment, the amount had been paid into court.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 13, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Richard Gowan, for appellant.

Hastings & Stedman, for respondents.

CHADWICK, J.—This action was begun by plaintiff to quiet title to certain real property in the city of Seattle, Washington, alleged to have been acquired by his grantor

¹Reported in 102 Pac. 425.

by virtue of certain tax foreclosure proceedings instituted by King county to recover delinquent taxes for the year 1890, and known as the "King County Omnibus Foreclosure Suit." Defendants acquired the property by purchase from the then owner in October, 1890. The lower court found that, on the 22d day of December, 1891, March 4, 1893, March 5, 1894, March 23, 1895, May 29, 1896, and November 13, 1897, defendants inquired at the office of the treasurer of King county what, if any, taxes were due and unpaid on the property, and on each of these occasions they were informed of an amount which they paid. It is also found that they paid the taxes for the years 1898, 1899, 1900 and 1901; that when they attempted to pay the taxes for the years 1902 and 1903, they were informed that the taxes had been paid, but they assumed that they had been paid by mistake. When they undertook to pay the taxes for the year 1904, they again inquired about the 1902 and 1903 taxes, and were informed that the land had been sold on November 15, 1902, to satisfy the 1890 taxes. The records did not disclose how much the land had been sold for, and defendants were unable to tender the amount due, with penalties and interest, on account of the 1891 taxes. The court also found that defendants had since offered to pay plaintiff the amount which he had paid as taxes, with interest, penalties, and costs, and that plaintiff had refused to accept payment thereof. Judgment was rendered in favor of defendants, and plaintiff appeals.

Error is assigned as follows: That the court erred in overruling appellant's demurrer to the amended answer and cross-complaint; that the court erred in holding the oral statement of the county treasurer to the effect that no taxes were due was equivalent in law to a payment of the taxes, and that the court erred in giving judgment without first requiring respondents to pay to appellant the amount paid out by him and his grantor with interest and costs. The first two assignments of error may be disposed of by a reference

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to the case of *Loving v. McPhail*, 48 Wash. 113, 92 Pac. 944, wherein the court said:

"The property holder made an effort in good faith to pay all taxes upon the property long before there was any delinquency, and was clearly prevented from doing so by the mistake or fault of the officer charged with the duty to collect the taxes. . . . Such an effort by the property owner to pay taxes is the legal equivalent of payment, in so far as to discharge the lien and bar a sale for nonpayment."

This decision followed the case of *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675, wherein the court quoted with approval from 27 Am. & Eng. Ency. Law (2d ed.), p. 775, as follows:

"If the owner of land, or a party having an interest therein, in good faith applies to the proper officer for the purpose of paying the tax thereon, and payment is prevented by the mistake or fault of such officer, . . . the attempt to pay is considered, in most jurisdictions, as the legal equivalent of payment in so far as to discharge the lien and bar a sale for nonpayment."

Reference to the judgment of the court discloses the fact that the amount found to have been paid out by appellant and his grantor had been paid into court prior to the entry of judgment. It follows that there is no merit in this assignment.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7875. Department Two. June 11, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. SAMUEL E.
MCCOOL, *Appellant*.¹

RAPE—EVIDENCE—CORROBORATION OF PROSECUTRIX—CONNECTING DEFENDANT. In a prosecution for rape, proof that the parties were together under suspicious circumstances at another time two months previous to the time charged, is not such corroborating evidence as tends to convict the defendant of the offense charged, within Laws 1907, p. 396, where the prosecutrix denied that any improper relations were had at that time.

SAME. In a prosecution for rape, proof that the prosecuting witness became pregnant, is not such corroborating evidence as tends to convict the accused of the crime, within Laws 1907, p. 396.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 26, 1908, upon a trial and conviction of the crime of rape. Reversed.

Buck & Boddy, for appellant.

Kenneth Mackintosh and *R. W. Prigmore*, for respondent.

DUNBAR, J.—The appellant was tried and convicted on the charge of statutory rape; that is, of having carnally known Minnie Phillips, a girl fifteen years of age; and upon conviction, was sentenced to the penitentiary for a term of years. It is assigned upon appeal that the court erred, (1) in admitting the testimony of the witness Mrs. Phillips; (2) in admitting the evidence of witness Dr. R. A. McClure; (3) in submitting the question of the defendant's guilt or innocence to the jury; (4) in refusing to instruct the jury as to the meaning of corroborating testimony as used by the court in his instructions; (5) in refusing to give the instructions requested by the defendant as to corroborative testimony.

It is not necessary to state the testimony of the prosecuting witness in this case *ad nauseam*. It may be conceded

¹Reported in 102 Pac. 422.

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that the testimony was sufficient to convict the appellant of the crime charged, if such testimony was believed by the jury and if it was corroborated by other testimony. Section 1 of chapter 170, page 396, of the Laws of 1907, is as follows:

"No conviction shall be had for the offense of rape, or seduction, in this state upon the testimony of the female raped, or seduced, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense."

The only contention in this case is that no corroborating testimony was given at the trial. The respondent introduced the mother of the prosecuting witness, who testified in substance that, about two months before the time at which the crime charged in the information is alleged to have been committed, she went over to McCool's (the appellant's) residence and knocked; that no one came to the door for quite a little time, and that she heard the back door open and some one rustling in the house; that McCool then came to the door, and it was locked; that he unlocked it, and she asked him if Minnie was there, and he said, no; she had been there and was gone; that he was very nervous; that she turned away and went back and saw Minnie going up 25th avenue; that she accosted the child and charged her with having been at McCool's, and she said that she had been there but Dolly, McCool's little girl, was not at home, and that she did not stay; that she told the child never to go there again. This testimony, it seems to us, was in no wise corroborative of the state's testimony, if for no other reason, because the prosecuting witness testified in the trial of this cause that there were no improper relations between her and the appellant on that date, her attention having been called to the time that her mother was there; and hence it could not be corroborative of any testimony of the girl tending to establish the crime charged.

Over the appellant's objection, the respondent introduced

one Dr. R. A. McClure, who testified that, from an examination made, he found the prosecuting witness to be in a state of pregnancy; that this examination was made in July, and the alleged rape was committed in April prior to that. It is difficult to see how such testimony as this would corroborate the testimony of the witness that any particular person had committed the act which was the cause of her condition at the time of the examination. It would, of course, under the laws governing statutory rape, be evidence that the crime had been committed, but could not in any way tend to establish the commission of the crime by any particular one.

The respondent relies on the case of *State v. Fetterly*, 33 Wash 599, 74 Pac. 810, and it is true that some things are said in that case—a case which was decided prior to the passage of the act above referred to—which lend color to the respondent's contention. But if the case intended to go as far as is claimed for it, it was certainly wrong, because it would shock the sense of justice to conclude that testimony that a rape had been committed was corroborative of testimony that the person accused, or any other particular person had committed the crime; especially when it is shown, as it was shown in this case, that the prosecuting witness had associated with other men before and after and about the time at which this crime is alleged to have been committed. This question, however, has since been squarely passed upon by this court in *State v. Jonas*, 48 Wash. 133, 92 Pac. 899, where, referring to this particular class of testimony, it is said:

“It is probably true, as contended by the appellant, that some of the testimony above alluded to, while generally referred to as corroborative in this class of cases, is not such within the meaning of this statute; or at least is not sufficient corroboration. It has often been held that mere proof of acquaintance and opportunity will not satisfy the requirements of such a law. The testimony of the physician tended in no way to connect the appellant with the crime

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charged, and perhaps would not be sufficient corroboration under ordinary circumstances."

The court, however, held in that case that there was other corroborative testimony sufficient to sustain the judgment.

Nor do the cases cited by respondent sustain its contention in this respect. For instance, in *State v. Baker*, 106 Iowa 99, 76 N. W. 509, it is said:

"If, considered in connection therewith, the other evidence tends to identify and single out the accused as the perpetrator of the crime, it is of that character contemplated by the statute, and its sufficiency is to be passed upon by the jury."

The other cases are to the same effect. But, as we have tried to show, there is nothing in the proof that a girl under the consenting age is pregnant, and that therefore necessarily a statutory rape has been committed, to point to any particular person as the perpetrator of the crime. With this view of the case, it is not necessary to pass upon the assignments in relation to instructions given and refused.

There being no testimony produced which would warrant a conviction, the judgment will be reversed and the cause dismissed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 7906. Department Two. June 11, 1909.]

JOHN B. NEEL, *Respondent*, v. KING COUNTY, *Appellant*.¹

HIGHWAYS—DUTY TO MAINTAIN—USE OUTSIDE HIGHWAYS—BARRIERS. A county is liable for injuries sustained by a traveler by team, who fell into a washout in close proximity to a road of such a dangerous character that barriers should have been erected, where the place outside the road line had been used as a part of the county road and as a continuance thereof, without being marked off therefrom, so that persons using ordinary care would be liable to drive thereon.

SAME—INSTRUCTIONS AS TO DUTY—INSURER OF SAFETY. In an action for injuries sustained by a traveler by team in falling into a washout, along a county road, an instruction requiring a county to maintain its highways in a reasonably safe condition for public travel, is not erroneous in that it makes a county an insurer of the safety of its roads, where by other instructions the jury were told the county would not be liable on account of the washout unless ordinary prudence would have anticipated and guarded against it.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 21, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a defective highway. Affirmed.

K. Mackintosh, John W. Whitham, George F. Vanderveer, and M. H. Ingersoll, for appellant.

John B. Hart and Robert H. Evans, for respondent.

DUNBAR, J.—The complaint alleges that the defendant, King county, maintains, among other roads and highways, a road and highway passing along through the town of Falls City and along a river bank, which road has been in existence for many years previous to the 30th day of November, 1907, the date of the accident which is the subject of this suit; that previous to said day, it had at all times been maintained in a safe condition for the traveling public for teams, etc.; that the plaintiff was familiar with said road as it had existed

¹Reported in 102 Pac. 396.

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for years previous to said day; that on said day the highway had become dangerous to life and limb of travelers, in that through the center of the highway and road a large washout occurred which the defendant permitted to exist; that said washout was to a depth of from eight to twelve feet across the entire width of the road, as it passed over the principal street of Falls City and as it bordered or skirted the river bank; that said washout had occurred several days previous to the 30th day of November, 1907, and that the condition of the road was well known to the authorities, etc.; that on the 30th day of November, 1907, and in the nighttime of said day, while the defendant carelessly and negligently maintained and permitted to exist said ditch, which constituted a death trap and man trap, without railings or warning signals of danger, plaintiff with other persons in a wagon, driven by horses, driving over said highway, not knowing the condition of the road, approached said road, passing over the said road from the north and west, and passed over the bridge spanning the Snoqualmie river; that immediately after passing over said bridge, he turned on to the right and passed down the highway running through the town of Falls City; that the night was dark, and there were no railings or barriers to prevent one from driving into said ditch, and that owing to the darkness of the night and the absence of railings or barriers, the team stepped off said bridge and highway, causing the accident complained of. It seems that there was a barrier crossing that portion of the street next to the sidewalk. As we understand it, the street or roadway was on the south side of the Snoqualmie river, and all the buildings were on the south side of the street. The defendant answered, denying negligence on its part, and alleging contributory negligence on the part of plaintiff in driving around the barriers which it had erected over a portion of the road, and proceeding to travel on that portion of the road outside of the barrier. The case was tried to a jury, and verdict was rendered in favor of plaintiff for the sum of \$5,510.

There is a sharp conflict in the testimony as to whether the barrier which had been erected by the authorities reached across the full width of the road, or whether the place at which the plaintiff was driving at the time of the accident was a part of the highway, or whether it was north of the highway; and that is, in fact, the main question in the case. The assignments of error on this appeal are that the court erred, (1) in denying defendant's motion to take the case from the jury at the close of plaintiff's evidence; (2) in overruling defendant's motion for a nonsuit; (3) error in admission of testimony; (4) error in giving and refusing to give instructions to the jury; (5) in denying defendant's motion for judgment notwithstanding the verdict; (6) and (7) in overruling defendant's motion for a new trial and entering judgment in favor of plaintiff.

It is contended by the appellant that there is no substantial testimony to the effect that the respondent was on the highway at the time the accident occurred. It is also contended that it is immaterial whether or not respondent was on the highway when he drove into the washout, as the court took that question from the jury by giving the following instruction:

"Should you further find that the wagon went into said ditch beyond and outside of the road line, but that the place where it went in was not marked off from the county road and was theretofore and then used as a part of the county road, and that its general condition was a smooth surface and a continuance of the county road and that the place where the injury occurred was close to the line of the county road, and that persons using ordinary care would be liable to drive off of the road and into the land adjoining, if you find these things, then I instruct you that it makes no difference whether the accident occurred on the roadway proper or near it;"

because, as is said by the appellant, this eliminates from the consideration of the jury the question of whether the respondent was actually on the roadbed at the time the accident occurred. It is claimed that this instruction is in vio-

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lation of the law, and many authorities are cited to sustain that contention. Among others, appellant quotes from Elliott on Roads and Streets (2d ed.), § 621, where it is said:

"The general rule appears to be that the duty to keep in repair extends only to the 'traveled path' or portion of the way in actual use, provided it is wide enough to be safe. Necessity and expediency, without anything more, would probably justify such a rule in the case of country roads."

The cases cited by that author to sustain the text, and those cited by the appellant, we have examined, and it appears to us that neither the text cited nor the authorities referred to are in point. It is, no doubt, true that the general rule is that the duty of the county or the city is only to keep in repair that portion of the way in actual use, provided it is wide enough to be safe. But there is an element in the instruction here that is not discussed or decided in the cases cited by appellant, and we have been unable to find any authority in text books or cases where it is held that, where a county uses and keeps in repair a certain territory as a road for travel, and has invited the public to use it as a road, it can escape liability for not mending or guarding the danger suddenly created across the highway, simply because the pitfall or danger was not within the limits of the road to which the county held the legal title. That is exactly the proposition involved in this instruction; for it will be noted that the court incorporated the qualification that the location outside of the road line was theretofore and then used as a part of the county road. This doctrine is based, it seems to us, on simple justice and fair play, on the theory that the county ought to be estopped from denying responsibility where it had issued an invitation to the public to travel on the location adjacent to a county road as a part of the road, and where the road was in such position topographically as to mislead the public, there being no defined boundary between the road and that territory which the public had been invited to travel upon as a part of the road. This doctrine of

liability under such circumstances was announced by this court in *Prather v. Spokane*, 29 Wash. 549, 70 Pac. 55, 92 Am. St. 923, 59 L. R. A. 346, where it was held that, where a city, although not required so to do, constructed a bicycle path, it would be held responsible for the maintenance in a reasonably safe manner, the court saying:

"It is first argued by the appellant that the city was not required to construct these bicycle paths; that it was optional with the city to do so or not, as it chose; and that, therefore, the liability arising from the mandatory duty is not imposed upon the appellant. Conceding this to be the rule, it does not apply in this case, because it is alleged that the path was constructed. The city having exercised its option to construct the path, the same rules must apply to the method and care in the construction and maintenance as applies where there is a duty imposed by law, viz., to so construct and maintain the path or street or walk that the same may be reasonably safe for the ordinary use for which it was intended;"

citing many cases to sustain the text.

Appellant refers the court to 15 Am. & Eng. Ency. Law (2d ed.), p. 455 (cited in appellant's brief as p. 451), where it is said:

"It is well settled that a municipality is under no obligation to fence its road or to put up barriers simply to prevent travelers so straying from the highway, and that, consequently, if a traveler so strays on to adjoining property and there meets with an accident at some distance from the highway, the municipality is not liable, though the barrier would have prevented such straying."

The author continued, however, in the next paragraph to say:

"If there is a dangerous place, however, such as a declivity or excavation, so close to the highway or to the traveled part thereof as to render the latter unsafe for travelers in the absence of a railing or barrier, the want of such railing or barrier constitutes a defect in the highway itself, for injuries from which the municipality is liable. But the danger which requires a barrier must be of an unusual character,

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such as a bridge, declivity, excavation, steep bank, or deep water, and a space adjoining a road or street may be left without a barrier though it be rough and entirely unsuitable for travel."

The text falls squarely within the facts in this case, the testimony showing that the excavation or washout into which the plaintiff fell was very dangerous and in very close proximity to the street, conceding that it was not in the street, and of such an unusual character that it should have been barred from travel to the unsuspecting and unnotified. The same authority says that the question of proximity is to be considered with reference to whether the highway was traveled or worked, rather than as laid out.

It was held in *Willey v. Ellsworth*, 64 Me. 57, that ways may be established by proof of public user or by a laying out by the constituted authorities; that the limits of the way are determined by user or by location; that however a way is shown to exist, it is one with limits defined by user or location.

In *Moran v. Inhabitants of Palmer*, 162 Mass. 196, 38 N. E. 442, it was held that an instruction, to the effect that the side of the street, although never actually wrought as a sidewalk, when used and permitted and intended by the town to be used by persons on foot was a part of the traveled highway, was correct, and that a side of a street may be in such form and so used with the knowledge and acquiescence of the town as to be a portion of the traveled part of the way which the town is bound to keep in repair, even though no work has been done upon it to fit it for the use of pedestrians; citing *Lowe v. Clinton*, 186 Mass. 24, and *Aston v. Newton*, 134 Mass. 507, 45 Am. Rep. 347.

In *Wakeham v. St. Clair*, 91 Mich. 15, 51 N. W. 696, where in an action against a town for personal injuries occasioned by a defective highway, the evidence showed that it was along the bank of a river; that to protect the highway, the town had constructed a breakwater by laying a line of

logs parallel with the river, and piling transversely thereon slabs to the height of the highway; that the space between the slabs and the bank had been filled in with earth, which extended half way over the slabs; that the roadbed was narrow; that at a certain point in the highway there had been a mud hole for some time; that there were two dangerous holes at the edge of the slabs, a few feet from the side of the mud hole; and that the town authorities knew of the condition of the road, and had placed a danger signal in the first hole, but left the second unguarded; it was held that, if the second hole was so near the way intended for travel that persons would be likely to get into it in seeking to avoid the mud hole, the town was guilty of negligence in allowing it to remain there for an unreasonable length of time. It will be seen that the circumstances and principles of the case were exactly on a par with the case at bar, where a portion of the street had been barricaded and the other portion, which was immediately adjacent to it, had been left without a guard.

In *Aston v. Newton, supra*, it was held that if, between the sidewalk of a street in a city and that portion of the street wrought for a carriage, there is a grassed space, over which a footpath has been worn by use by persons having occasion to enter another street abutting on this street but not crossing it, or to come in the opposite direction, the city is liable to a person injured by a defect in such path, if the path was known to and recognized by the city as a part of the wrought line of travel, in the absence of any path or other provision made by the city for crossing the street at or near the locality in question, or of any barrier or other warning to indicate that the path as actually used was unsafe or unsuitable. To the same effect is *Watson v. Proprietors of Lisbon Bridge*, 14 Me. 201, 31 Am. Dec. 49, and *Saltmarsh v. Bow*, 56 N. H. 428, where it was held that, if a town suffers the traveled part of a highway to become widened, so as to hold out to the traveler that the whole width is equally suitable for the public travel, it is answerable for damages grow-

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ing out of defects in the part so widened; and, in fact, we think this is almost the universal authority when the cases cited are properly analyzed.

It is the claim of the respondent, and there is sufficient testimony to support that contention, if the jury believed it, that all the land between the sidewalk on the south part of the street and the telephone poles on the river bank, had been recognized and used as the public road, and that work had been done on all parts of it; so that, in the absence of error in the instructions, the determination of the questions of fact by the jury is conclusive.

It is also contended that the court erred in giving the following instruction:

"It is the duty of the county, such as the county of King, to maintain its public highways and roads in a reasonably safe condition for public travel. That duty must be exercised by the officials of the county having charge of the public highways, and failure to exercise that duty and failure to maintain its highways in a reasonably safe condition for public travel, such as might be reasonably expected by those who travel over these highways, would constitute negligence on the part of the county."

It is contended that this instruction makes the county an insurer of those who travel upon the highway, and that there is a difference between using reasonable diligence in maintaining a highway in a reasonably safe condition for public travel, and maintaining its public highways in a reasonably safe condition for public travel. But the instruction of the court on this particular proposition, when viewed as a whole, is not prejudicial, for after giving that part of the instruction complained of, the court proceeded:

"The county officers are not required under the law to anticipate unforeseen or unusual occurrences, such as an unusual flood or freshet, and such occurrences in the law are considered to be the acts of God, which county officers are not required to guard against. So the first thing for you to determine in this case is whether or not this washout that

occurred in the street was one which ordinary prudence would have anticipated and guarded against. If ordinary human prudence and caution would not have anticipated and guarded against it, then it was not negligence on the part of the county that the washout really occurred. Under these circumstances, it would be considered an act of God, so that for the washout itself, the county would not be responsible. If, however, it was such an occurrence that human prudence would ordinarily foresee and ordinarily in the exercise of reasonable care would anticipate and guard against, then it would not come under the class of occurrences known as the act of God, and it would be negligence on the part of the county not to have guarded against it or prevented it."

So that the duty of the county after all was gauged by ordinary human prudence and caution, and the county was not, under such an instruction, made an insurer of the safety of those who travel along its highways. The instruction as a whole was clear and explicit, and covered every point involved in the controversy.

We are unable to discover that the court committed error in giving or refusing instructions, or in the admission or rejection of testimony. While the amount of the verdict in this case from one standpoint seems to be large, yet from the legitimate testimony presented in the case, we are not able to say that it is the duty of this court to interfere with the verdict of the jury in that regard.

The judgment will be affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 7940. *En Banc.* June 11, 1909.]

THE STATE OF WASHINGTON, *on the Relation of North Shore Boom & Driving Company, Relator*, v. NICOMEN BOOM COMPANY *et al.*, Respondents.¹

APPEAL—DECISION—JUDGMENT ON REMAND. A decree upon remand properly describes a boom site location where it follows a plat, findings, and complaint specifically referred to and upheld by the decision of the supreme court.

APPEAL—DECISION—EFFECT—QUESTION DECIDED—JUDGMENT AFTER REMAND. Where the decision of the supreme court upholding a boom site location holds that the state has dominion, for the purpose of boom sites, over both land and water, and has conferred upon the boom company the right to operate a boom in certain waters, the decree upon remand properly designates the waters of the river to be appropriated, the decision of the supreme court being *res judicata*.

SAME. Where a complaint asks for an injunction against interference with a boom site, and such relief is denied, a judgment on appeal, which holds that such interference is unwarranted and must be restricted and that the conclusions of the trial court were erroneous, and directs a reversal accordingly, requires the entry, upon remand, of judgment granting the injunctive relief prayed for.

Certiorari to review a judgment of the superior court for Pacific county, Rice, J., entered January 16, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enjoin the construction of a boom. Affirmed.

Chas. E. Miller, W. H. Abel, and E. C. Hughes, for relator.

W. W. Cotton, Welsh & Welsh, and James G. Wilson, for respondents.

MORRIS, J.—The relator brings this writ, alleging that the superior court of Pacific county has entered a decree unwarranted by and contrary to the mandate of this court as expressed in its decree and remittitur filed in the lower court

¹Reported in 102 Pac. 394.

on January 16, 1906, in the case of *Nicomen Boom Co. v. North Shore Boom & Driving Co.*, which case will be found reported in 40 Wash. 315, 82 Pac. 412, to which reference is hereby made for a more extended review of the facts in controversy between these two companies, and the rulings and decision of this court upon the matters then, and in so far as they may now be, involved. There is much history of litigation between these companies, involving suits at law and in equity in the superior court of Pacific county, in this court, and in the supreme court of the United States, growing out of their respective claims to boom sites in the North river, a recital of much of which would be necessary to a proper understanding of this last phase of the controversy as here now presented; but inasmuch as the matters here directly involved are of no particular moment except to the parties litigant, and present for discussion and decision no points of law, except the determination as to whether the decree of the court below is a correct interpretation of the mandate of this court, we do not refer to them, for the sake of brevity, except in so far as it may be necessary to rule upon the questions suggested.

The first error or departure suggested is in the description of the location of respondent company. The decree adjudges that respondent has a valid prior location for booming purposes, on the waters of, shore lines of, and lands contiguous to, North river, according to its plat, and describes said location as follows:

“All that portion of North river lying and being in Pacific county, Washington, and more particularly described as follows, to wit: Commencing at the mouth of North river, in section 26, township 15, north of range 10 west of Willamette meridian, thence running up said river and on and along the meanders thereof on both banks thereof, and including between said meanders and the shore lines of the waters and all waters and lands contiguous thereto, and river bed of said North river to the point where said North river intersects the north line of section 23,” etc.

Relator contends that, under this description, respondent's location is made to embrace the entire bed and tide lands of North river, from the meander line on one side to the meander line on the other, including the lands contiguous thereto on both sides. This description is evidently taken from respondent's plat and survey of location, which it had filed with the secretary of state April 5, 1900, showing so much of the shore lines and waters of North river and lands contiguous thereto as it proposed to appropriate; and the same plat and survey referred to in the court below in its findings, and by this court. Reference is frequently made to the location of the respondent as shown by its plat, so that there could be little doubt in the mind of the court below, when it entered its decree, that this court had determined that respondent was entitled to the use and possession of all the territory embracing both land and water, within the outside lines of its plat. Said decree also describes the tide lands of the respondent. An examination of the original complaint in the action shows these tide lands to be contended for by the respondent, and they are found by the findings of fact as belonging to the respondent and acquired for the purpose of its booming operation, and the decision of this court specifically so refers to said lands.

Relator next contends that the plat of location should not designate the waters of the river proposed to be appropriated. This court, on page 327 of its opinion, thus states its position:

"The state, however, has dominion over both the land and the water. The legislative scheme for boom companies requires that the land owner shall permit his land to be subjected to the use of such companies, upon receiving compensation therefor, and the title is thus acquired. It is true, the state does not pass title to the beds and waters of its streams; but, as an accompaniment of the right to condemn adjacent lands, it has directly conferred upon boom companies the right to locate and operate booms in such waters. As a part of the location plan, the plat and survey shall designate not

only the lands, but the waters, desired to be used. The plat when filed becomes notice to the world of the appropriated territory, and while the state requires the upland owner to submit to the use of his lands, it also confers, directly upon the locator, the right of dominion over the water in aid of the other use. In considering these location rights, we therefore see no reason for making a distinction between those acquired upon land and those acquired in the waters. The state has not only authorized both, but they are combined rights, having in view a common end, and neither would be useful for accomplishment of that end without the aid of the other."

Such contention on the part of the relator is, therefore, *res adjudicata* here, and cannot again be questioned under the holding above quoted. The plat properly showed the waters as well as the land contiguous thereto. The decree of the lower court was, therefore, in accordance with the holding of this court in describing the location of respondent as embracing the waters of North river.

The next contention of relator is that the court below was not justified in granting respondent an injunction. The prayer of the complaint was in part as follows:

"That the defendant, its officers, agents, and employes, and those acting under or in aid of defendant, be forever restrained and prohibited from doing any of the acts complained of in this complaint, and from entering upon the tide lands of said plaintiff, and from entering upon in any manner whatever of the shore lines and waters of said North river within the territory appropriated and used by plaintiff for its said booming works, and from driving any piles, timber or anything else on plaintiff's said tide lands, or any part thereof, and from driving any piling or other thing whatever within said North river or the shore lines thereof, within the territory in Pacific county, Washington, which is appropriated by plaintiff, as described in plaintiff's said exhibit A."

The decree below, from which the appeal was taken to this court, denied respondent's application for such an injunction, and dismissed the action. Thus it will be seen that one of the questions directly submitted to this court upon the ap-

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peal was as to the right of respondent to injunctive relief, restraining the relator from doing the things complained of within the territory claimed by respondent as shown by its plat and survey. In passing upon such point, the decision of this court thus reads:

"The court finds that appellant's [respondent's here] contemplated extension cannot be made and operated by reason of respondent's [relator's] boom. The two cannot exist together. It follows that respondent [relator] is unwarrantedly interfering with appellant's [respondent's here] location, and that in its booming operations the former must be restricted to territory outside of the latter's location. We think the court erred in its conclusions of law. The judgment is therefore reversed and the cause remanded, with instructions to make conclusions of law and enter judgment in accordance with what has been herein said."

We fail to see how the court below could have read this language other than it did and, in accordance with its mandate, decree respondent its injunctive relief to the extent of the facts found, and within the territory embraced in its location. Finding no justification for the writ, the judgment is affirmed.

RUDKIN, C. J., CHADWICK, MOUNT, CROW, and PARKER, JJ., concur.

FULLEERTON, GOSE, and DUNBAR, JJ., took no part.

[No. 7336. Decided June 12, 1909.]

ABRAHAM KLINE *et al.*, Appellants, v. BONHAM GALLAND
et al., Respondents.¹

EQUITY—LACHES—STALE DEMANDS. Where parties to whom an estate had been devised, subject to a life estate in the wife, delayed for fifteen years in bringing an action to set aside probate proceedings declaring the separate estate of a husband to be community property, and to set aside deeds made by them on fraudulent representations, the delay being until four months after the death of the wife, who it is alleged had fraudulently deceived the parties as to the nature of the estate, there is such gross laches as to bar the action, the heirs having for many years lived in Washington and adjoining states, some of them in the city where the judgments were matters of record and accessible, without taking any steps to contest the proceedings, although knowing that they had some interest in the estate, and making no explanation of their continued ignorance as to their rights.

INFANTS—LACHES—REPUDIATION OF CONTRACT. Where a minor, before majority, gave a deed of his interest in an estate, and, after becoming of age, failed to promptly repudiate the deed, and only commenced action within three days of the year limited therefor to set aside the probate proceedings, which had been a matter of record for fifteen years, he is guilty of laches barring a recovery, regardless of the statute of limitations.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 24, 1908, upon sustaining a demurrer to the complaint, dismissing an action to vacate certain orders and deeds, and to quiet title, after a trial before the court without a jury. Affirmed.

Robertson & Rosenhaupt and *Reynolds, Ballinger & Hutson*, for appellants.

Shank & Smith and *Kerr & McCord*, for respondents.

Shepard & Flett, for respondent Northwestern Mutual Life Insurance Company.

Crow, J.—Action by Abraham Kline, Laura Kline, his wife, and twenty-five others, against Bonham Galland,

¹Reported in 102 Pac. 440.

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Emanuel Rosenberg, and Isaac Cooper, as executors of the last will and testament of Caroline Kline-Galland, deceased, and others, to vacate certain orders made in the administration of the estates of three several decedents, to set aside a number of deeds, and to obtain the title to and possession of real estate. The defendants interposed demurrers to the complaint, which were sustained. The plaintiffs thereupon declined to plead further, and judgment of dismissal was entered, from which they have appealed.

The controlling question before us is the sufficiency of the complaint. The appellants have prepared an able and exhaustive brief, presenting numerous questions which we need not consider; for, while several reasons appear in the record for affirming the judgment of the trial court, the complaint itself shows such gross and unexplained laches as to preclude the appellants from obtaining any relief in a court of equity.

The complaint, in substance, alleges, that Lazarus Kline and Caroline Kline, his wife, lived in the state of Oregon continuously, many years prior to 1877, when they moved to Seattle, Washington; that Lazarus brought with him a separate estate of the value of \$30,000; that he invested \$15,000 thereof in a mercantile business; that about eleven years later, with the proceeds and profits of such separate estate and mercantile business, he purchased the real estate now in dispute, the same being located at Second avenue and University street in the present business district of Seattle; that he died testate on April 15, 1891; that his widow, Caroline Kline, was appointed executrix of his last will and testament; that he owned other real estate in Seattle and King county, and that by his will he made the following devises:

"I give and bequeath the property situated on Second and University streets in the city of Seattle, state of Washington, to my brothers Isaac Kline, Lob Kline and Moses Kline, residing in Germany, to my brother Abraham Kline of Seattle, state of Washington, and to my brother in law Joshua Seitenbach, also a resident of Germany, the income of the said property to be used and enjoyed by my wife, Caroline

Kline, during her lifetime and after her death the aforesaid property shall be divided equally between the aforesaid heirs.

"I charge my estate to pay to my brother Abraham Kline the following sums, namely: Five hundred dollars in the year 1893, five hundred dollars in the year 1894, five hundred dollars in the year 1895, and five hundred dollars in the year 1896.

"I further charge my estate to pay to my brother Moses Kline, residing in Germany, the sum of one hundred dollars every first day of May in each year during his natural life.

"It is my wish and I demand that the indebtedness owing to me by Joseph Kline and Abraham Kline of Seattle, State of Washington, shall be cancelled and no further demand on them to be made for the payment of the same.

"All the rest and residue of my estate, real, personal and mixed and of what kind soever and wheresoever situated of which I may die possessed I give and bequeath to my beloved wife Caroline Kline";

that in one year all debts of the estate were paid; that the executrix filed her petition for final distribution, in which she alleged the real estate above mentioned was community property; that statutory notice was given; that thereafter without other or personal notice to any of the legatees, a final decree was entered in the matter of the estate, by which it was adjudged that the realty was community property, and distribution was made as follows:

"An undivided half thereof to said Caroline Kline, said undivided one-half being her community interest in said property, and a life estate in the other undivided one-half thereof to said Caroline Kline, according to the terms of said will; and the remainder of said undivided one-half after the termination of said life estate to said Isaac Kline, Abraham Kline, Lob Kline, Moses Kline, and Joshua Seitenbach"; that Lob Kline, brother and legatee of the deceased, died intestate in Germany in 1898, leaving a widow and nine heirs at law, now appellants in this action, all of the age of majority except one, Gustave Kline, a minor son who reached his majority on June 25, 1906; that Moses Kline, another brother and legatee, died intestate in Germany in

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1901, leaving a widow and four heirs at law, all of the age of majority, now appellants in this action; that none of the appellants at any time until immediately prior to the commencement of this action had any knowledge that the estate of Lazarus Kline, deceased, was his separate property, and not community property; that Caroline Kline, his executrix, represented to appellants that she was the owner of an undivided one-half interest in the Second avenue and University street property, and a life estate in the other undivided half interest, and that the remainder of the latter half was owned equally by Abraham Kline, the Moses Kline estate, Isaac Kline, the Lob Kline estate, and Joshua Seitenbach; that Caroline Kline later intermarried with one Bonham Galland, and was thereafter known as Caroline Kline-Galland; that in 1904 Caroline Kline-Galland fraudulently represented to the appellants that the real estate on Second avenue and University street was only of the value of \$150,000, when it was in fact worth \$400,000; that relying on such representations, the appellants orally agreed to sell her their interest for \$75,000, ignorantly believing it to be only an undivided one-half interest subject to her life estate; that \$15,000 was to be paid by her to each of the five original legatees or their representatives; that Caroline Kline-Galland caused two separate but unnecessary administration proceedings to be had in the superior court of King county, upon the respective estates of Lob Kline and Moses Kline, deceased, the same person being appointed administrator of each estate; that the appellants, who are heirs of the decedents, knew some such proceedings were being conducted, to promote the sale of their supposed interests to Caroline Kline-Galland, but that they had no precise knowledge of the same; that in the probate proceedings sales were made of the interests of Lob Kline and Moses Kline, which were purchased by Caroline Kline-Galland, for \$15,000 each; that the sales were confirmed; that administrator's deeds were executed and delivered; that on January 22, 1906, the administrator, on order

of court, made final distribution of the estates to the respective heirs of Lob Kline and Moses Kline, who accepted the same; that the share of the minor heir Gustave Kline was paid into the registry of the court for his use, where it has since remained, being refused by him; that Caroline Kline-Galland, in pursuance of her oral agreement and such administration proceedings, paid \$15,000 for each of the five original interests represented by the legatees named in the will of Lazarus Kline; that each and all of the appellants, including the minor Gustave Kline, made deeds of conveyance to her under the mistaken belief that they were only conveying an undivided one-half interest subject to her life estate; that thereafter she mortgaged the property to raise the \$75,000 with which she purchased the appellants' interests; that Caroline Kline-Galland died testate in February, 1907, and that the respondents Bonham Galland, Emanuel Rosenberg, and Isaac Cooper are executors of her last will and testament.

This action was commenced about four months after the death of Caroline Kline-Galland, and three days before Gustave Kline, who verified the complaint, attained the age of twenty-two years. The appellants in part contend, that the real estate was Lazarus Kline's separate property; that the probate order of the superior court adjudging it to be community property was void; that being made without notice to any of the legatees, such order was a taking of their property without due process of law; that the sales made by appellants to Caroline Kline-Galland were ignorantly made by them for an inadequate consideration, by reason of her false and fraudulent representations upon which they relied as to the extent and value of their interests; that the several deeds executed and delivered by them should be set aside and vacated; that the probate proceedings in the estates of Lob Kline and Moses Kline were unnecessary; that the probate sales were void and should be vacated, for the reason that they were not necessary for the payment of debts, and that,

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in any event, Caroline Kline-Galland did not obtain the interest of the minor heir Gustave Kline.

The respondents in part contend that some fifteen years prior to the commencement of this action, the superior court, sitting as a court of probate, decreed Caroline Kline to be the owner of an undivided one-half of the property as her community interest; that such decree is *res adjudicata*; that this action has not been commenced within the time limited by law; that the appellants have been guilty of gross and unexplained laches, and that the complaint does not state facts sufficient to constitute a cause of action.

The original order of distribution was made in the estate of Lazarus Kline on June 23, 1892. It adjudged that the real estate was community property, and awarded an undivided one-half thereof to Caroline Kline. That order has since been a public record. A number of the appellants have lived in Washington and adjoining states, some of them in Seattle, for many years since its entry. They were aware of the fact that they had some interest in the estate. Although the complaint in substance alleges that all of the appellants were ignorant of the law, ignorant of the extent of their interest in the estate, ignorant of its value, and ignorant of the purpose and legal effect of the administration of the estates of Lob Kline and Moses Kline, deceased, which probate proceedings were also matters of public record, it is nevertheless impossible to understand why they failed to avail themselves of accessible information afforded them by public records, and neglected to ascertain the value of the property, or how Caroline Kline-Galland could, for almost fifteen years, successfully prevent them from doing so. The complaint itself alleges that the property, which is situated in the business district of Seattle, has rapidly advanced in value. Adverting to the fact that a number of the appellants resided in and near that city, it would seem that under such circumstances, with existing public records to afford them accurate information, something more should be required of

them to excuse their laches and explain their delay in bringing this action than a mere allegation of ignorance of their rights, and the oft repeated statement that all of them, some twenty-seven in number, were continually deceived and misled by the false and fraudulent representations of Caroline Kline-Galland. According to the complaint, they were in dense ignorance of the true facts until after her death when, by some mysterious method utterly unexplained, such ignorance was suddenly supplanted by full and complete knowledge. Her evidence was then lost, and the property had rapidly appreciated in value.

Before appellants can secure any opportunity in a court of equity to question such long standing judicial records, to set aside their own deeds deliberately executed after long continued negotiations, they should, by good, clear, and sufficient allegations, explain their ignorance, their unusual delay in asking relief, and the suddenness with which they so readily secured knowledge of all the facts immediately after the death of Caroline Kline-Galland, when the possibility of producing her evidence in court was forever precluded. Appellants, in effect, assert that, because Caroline Kline-Galland claimed the identical title awarded her by the decree of the probate court, her representations were fraudulent, but they signally fail to state any facts disclosing why or how they learned of her alleged fraudulent actions and misrepresentations so quickly after her death. *Sackman v. Campbell*, 15 Wash. 57, 45 Pac. 895.

Assuming the correctness of appellants' contention, that Gustave Kline, who verified the complaint, had one year after reaching his majority within which to bring this action, nevertheless the principle of laches should apply as to him. He knew all the facts before reaching his majority. He had executed a deed to Caroline Kline-Galland, which he failed to promptly repudiate, and although he declined to withdraw the money deposited in the registry of the court, he delayed action until only three days remained of the year succeeding

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his majority within which he could question the judicial proceedings in the administration of his father's estate.

In *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182, it has been held by this court that, although a party may have a year in which to set aside a judgment, still the person seeking to set it aside must move with diligence within that year. Gustave Kline by waiting until only three days remained of the year, and then commencing action without any allegation to explain his delay and laches, brought himself within the rule there announced. In *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060, this court commented on the question of laches, saying:

"Where a case is of purely equitable cognizance, in the application of the doctrine of laches courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, ancient demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights. In such cases the statute of limitations does not necessarily govern the court in the application of the doctrine of laches. 9 Ballard, Law of Real Property, § 757; *Gay v. Havermale*, 30 Wash. 622, 71 Pac. 190; *Boyer v. East*, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. 290; *Gallagher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Penn. Mut. Ins. Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626. There is no inflexible rule controlling the application of the defense of laches. The facts and circumstances of each case must govern courts of equity in permitting said defense to be made. The authorities show that, while lapse of time is one of the elements to be considered in applying this equitable defense to stale claims, it is only one, and that it is not necessarily the controlling or most important one. Regard must be had to all of the facts and surrounding circumstances, and if, when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should be allowed."

The perfect means of knowledge which all of the appellants possessed and of which they neglected to avail themselves, should now estop them in this proceeding. The records of the court were open to them, and although it be conceded that

Caroline Kline-Galland attempted by her alleged misrepresentations and statements to deceive them, they have shown no sufficient excuse for their long continued failure to inform themselves of the true situation by an examination of the records, and an investigation of the value of the property. Their unexplained laches has been so gross and inexcusable as to preclude them from obtaining any equitable relief.

The judgment is affirmed.

RUDKIN, C. J., PARKER, MOUNT, and DUNBAR, JJ., concur.

FULLERTON, J., concurs in the result.

GOSE, J. (concurring)—As I view the case, the minor Gustave Kline was concluded by the proceedings in the estates of Lazarus Kline, his uncle, and Lob Kline, his father. The deed of Gustave was therefore not necessary to transfer his inheritance. It follows that the question of laches has no application to him. I concur in the result.

[No. 8079. Department Two. June 12, 1909.]

COLUMBIA & PUGET SOUND RAILROAD COMPANY, *Respondent*,
v. ALBERT S. MOSS, *Appellant*, MARY E. STEVENS
et al., *Interveners*.¹

APPEARANCE—GENERAL—WAIVER OF SPECIAL APPEARANCE—APPEAL—DECISION—REMAND. A general appearance in the supreme court, without reserving or alluding to a prior special appearance to object to the jurisdiction, waives the latter; and upon a reversal for a new trial, the lower court is vested with complete jurisdiction.

FORCIBLE ENTRY AND DETAINER—JUDGMENT—VALIDITY. Error in issuing a writ of restitution during the pendency of an action of forcible entry and detainer cannot be urged as ground for reversing the final judgment.

FORCIBLE ENTRY AND DETAINER—STATUTES—CHANGE OF REMEDY. A notice to quit served prior to the amendatory act of 1905, is not ineffectual by reason of such prior service.

¹Reported in 102 Pac. 439.

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FORCIBLE ENTRY AND DETAINER—PREMATURE ACTION—ISSUES—JUDGMENT. In an action of forcible entry and detainer, where interveners were ousted by a provisional writ of restitution without notice, the action was premature as to them, and the final judgment should restore them to their original possession; but it is error to also restore them "to the unexpired term therein," when that was not an issue in the case.

Appeals from judgments of the superior court for King county, Griffin, J., entered July 9, 1908, and August 13, 1908, upon findings favorable to the plaintiff against the defendant, and favorable to the interveners against the plaintiff, after a trial on the merits before the court without a jury, in an action to recover possession of real property. Affirmed on defendant's appeal, and modified as to interveners.

Bevvington & Finch, for appellant.

Farrell, Kane & Stratton, for respondent.

Vince H. Faben and *S. H. Kelleran*, for interveners.

RUDKIN, C. J.—This was an action to recover possession of real property under the forcible entry and detainer laws. The case was before this court on a former appeal, where a statement of the issues will be found. 44 Wash. 589, 87 Pac. 951. After the record was remitted to the court below, a retrial was had before the court without a jury. The court gave judgment in favor of the plaintiff and against the defendant Moss for the possession of the entire premises described in the complaint, and against the plaintiff and in favor of the interveners for the possession of a certain undefined portion of the same premises which had theretofore been occupied by them. Two several judgments were entered in the case, and from these the aggrieved parties have appealed. We will first consider the appeal of the defendant Moss.

The first contention is that the court below acquired no jurisdiction over the person of this appellant by reason of certain defects and irregularities in the process served upon him. In the case of *Larsen v. Allan Line Steamship Co.*, 37

Wash. 555, 80 Pac. 181, 9 L. R. A. (N. S.) 1258, the court held that a special appearance was waived unless reserved at every stage of the proceeding, and in commenting on the rule thus established, the court said:

"What may appear to be strictness in this rule commends itself to us, for the reason that a defendant may stand upon his special appearance without the necessity of a long, tedious, and expensive trial, as was had in this case. But if he chooses to pursue the latter course, he should at least make clear with all of his appearances that he has not waived his special appearance. Any error involved in the assignment above mentioned has, therefore, been waived, and the court had jurisdiction of the person of the defendant."

On the former appeal this appellant entered a general appearance in this court without reserving or alluding to his special appearance. By virtue of that appeal this court acquired full and complete jurisdiction over the subject-matter of the action and the parties to the appeal, and might affirm, reverse, or modify the judgment appealed from, or direct the proper judgment to be entered, or direct a new trial or further proceedings to be had. Bal. Code, § 6521 (P. C. § 1069). And when this court reversed the prior judgment and remanded the case for a new trial, the lower court became vested with full and complete jurisdiction to carry out its mandate. If the appellant desired to rely upon his special appearance, he should have saved the point, and brought the question to the attention of this court at the earliest opportunity. Having failed to do so, and having submitted to the jurisdiction of this court without reserve, the objection to the jurisdiction was waived.

It is next contended that the provisional writ of restitution under which the respondent was restored to possession of the property in controversy during the pendency of the action was void, because the act authorizing such writs in unlawful detainer proceedings instituted under the amendatory act of 1905, Laws 1905, p. 173, is unconstitutional, and because the writ of restitution was served before the service of

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summons. If we should accede to the correctness of this contention, it would not call for a reversal of the final judgment in the case, for a final judgment correct in itself will not be reversed simply because some provisional writ was improperly or improvidently issued. If the appellant was wrongfully ejected from the premises during the pendency of the action, he has his remedy, but that remedy is not the reversal of a judgment restoring possession to the rightful owner after a full hearing on the merits.

It is next contended that the notice to quit or surrender possession was ineffectual because served before the amendatory act of 1905 took effect, but that question was decided adversely to the appellant on the former appeal. The appellant's claim of title by adverse possession was waived at the hearing, on the authority of *McNaught-Collins Improvement Co. v. May*, 52 Wash. 632, 101 Pac. 237, and need not be further considered. There is no formal assignment of errors in the appellant's brief, but the foregoing seems to dispose of all the points discussed, and the judgment of the court as to the appellant Moss must be affirmed.

The complaint in intervention alleged that the interveners were in possession of certain premises lying to the east of the block of land described in the complaint, at the time of the commencement of the original action, and were wrongfully ousted therefrom under the provisional writ of restitution. The court found, however, that the interveners were in possession of a certain undefined portion of the premises described in the original complaint, at the time of the commencement of the action, that they were ousted from such possession, without notice, under the provisional writ of restitution, and gave judgment restoring them to their former possession and to *the unexpired term therein*. If the interveners were in possession of a portion of the premises at the time of the commencement of the action, and were ousted therefrom without notice or opportunity to be heard, they were properly restored to their former pos-

session, but the judgment went beyond this and restored them to their unexpired term therein. What that unexpired term may be we do not know, nor was the nature or extent of that term an issue in the case. As to the interveners the action was prematurely brought, and the court should have simply restored them to their former possession without attempting to adjudicate their rights, and in so far as the court did attempt to adjudicate their rights, the judgment is erroneous and must be modified.

As to the appellant Moss, the judgment is affirmed with costs. As between the plaintiff and the interveners, the judgment is modified as above indicated, and as thus modified the judgment is affirmed, without costs.

DUNBAR, CROW, MOUNT, and PARKER, JJ., concur.

[No. 7316. Decided June 14, 1909.]

HUGHES MANUFACTURING AND LUMBER COMPANY, *Plaintiff and Appellant*, v. PARKER-BELL LUMBER COMPANY, *Defendant and Appellant*.¹

SALES—CONTRACT—COMPLETION—LATENT DEFECTS—PROOF OF CUSTOM. A contract for the sale of lumber, made by correspondence, cannot be objected to as incomplete in specific details of the specifications, where they were only latent defects which might be proved by parol, if the writings were ambiguous at all; and especially not where the specific points made are expressly covered by different letters.

SALES—CONTRACT—PRICE—PROOF OF CUSTOM. On the sale of lumber at a mill in Washington, tally and inspection to be made at point of delivery in California, whether the price fixed was net at the mill or gross at the point of delivery, would, in the absence of specific agreement, depend upon custom that could be proved by parol.

Cross-appeals from a judgment of the superior court for King county, Tallman, J., entered October 21, 1907, upon

¹Reported in 102 Pac. 433.

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findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

John B. Hart and Walter S. Fulton, for plaintiff.

Shank & Smith, for defendant.

MOUNT, J.—This action was brought by the plaintiff to recover from the defendant for failure to deliver a certain lot of lumber according to an alleged contract of sale. The case was tried to the court without a jury, and a judgment was rendered in favor of the plaintiff for \$436.05. Both parties have appealed. We shall, therefore, designate the parties as plaintiff and defendant in this opinion.

The statement of facts was stricken on motion of the defendant, so that the only question left to be considered in the case is whether the complaint and bill of particulars, filed in connection therewith, allege a completed contract. The complaint alleged, in substance, that the plaintiff offered to purchase from the defendant 750,000 feet of lumber, board measure, at an agreed price of \$14,211.45, f. o. b. ship's tackle, San Pedro Harbor, California, and that the offer was accepted by the defendant, and it agreed that tally and inspection of said lumber should be made at San Pedro; that the offer and acceptance were in writing, and that defendant refused to deliver the said lumber.

Defendant demanded a bill of particulars, and in response the plaintiff served and filed in the case a number of letters and telegrams which are claimed to constitute the written contract sued upon. It will not be necessary to set these letters out in full. We shall refer to the material parts only. On January 17, 1906, defendant, from Seattle, Washington, sent a telegram to the plaintiff at Los Angeles, California, saying:

"Can furnish, if accepted at once, 600 to 800,000 clear and merchantable, 60 days, standard sizes, clears \$2 off list 3, merchantable \$1 off."

On January 20 plaintiff wrote to defendant, saying:

"Replying to your letter of the 15th, we desire to say that we have this day wired you, 'Can pay three off No. 3 list selects and clears, \$1 off merchantable,' . . ."

On January 20 the defendant sent a telegram to the plaintiff as follows:

"Send specifications immediately. If satisfactory will accept your price, 400,000 selects and clear, 300,000 merchantable. Answer."

On January 26, 1906, plaintiff wrote a letter to defendant, saying:

"We herewith inclose you memoranda for 750,000 feet, which is more merchantable than you requested."

This letter explained the use to be made of a part of the lumber, and inclosed an itemized list of the lumber, together with the price for each item, and also the total, which was \$14,211.45. One item in the list was as follows: "30 M 2x8 —, 26 to 32 merchantable." On January 31, 1906, defendant sent a telegram to plaintiff, as follows:

"We accept order. Mill inspection and tally by Pacific Coast Lumber Inspection Bureau. Can load first cargo soon as boat arrives. Make 2x8 read 12 to 32 feet. Answer."

On February 3, 1906, defendant also wrote a letter to plaintiff, as follows:

"We just wired you that we have sent boat to Montesano for first cargo, and have been notified by mill today that second cargo will be ready within ten or fifteen days. The Montesano mill have been insisting on tally and inspection at the mill, and consequently we wired you to this effect. We hope you will see your way clear to have inspection done through the bureau here."

On February 8, 1906, plaintiff wrote a letter to defendant, as follows:

"Replying to your letter of February 3rd, relative to having the inspection and tally of the cargo done at shipping

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point, we would say that it is customary to have it done at San Pedro, as all of the other lumber we have bought and the other lumber companies have done it that way. We feel as though we are entitled to as much consideration as the other purchasers. Referring to the matter of changing our former specifications to make the 2x3's read 12 to 36 feet in length, we called up our purchasers and they objected to making the change. However, we believe if you would send a small portion of the shorter lengths we could work them through. If there was any serious objection we could put them in our own yard and probably use them elsewhere."

On February 12, 1906, defendant wrote to plaintiff, saying:

"We have your favor of the 8th inst., and note what you say relative to inspection and tally, stating that it is customary to have it done at San Pedro. . . . However, as this order has been placed, we will allow it to be inspected at San Pedro."

On March 1, evidently in answer to a telegram not in the record, plaintiff wrote to defendant as follows:

"We are just in receipt of a telegram asking us to send a boat or allow you to cancel the order. There seems to be something wrong. It appears that the sender of this late telegram is not familiar with the past correspondence. If you will refer to the beginning, January 12, you will find that you wired us asking if we were in the market for stock. On January 17 you quoted prices. January 20 we made offer. January 22 you wired us to send specifications. January 31 you wired us order accepted. On February 2 you wire us to the effect that you have ordered boat to Montesano for first cargo, which you acknowledged by letter dated February 3. The telegram we received today confuses us, and we hardly know what you mean."

The remainder of the letter, which is long, in effect refused to send boat or cancel order, and explained the reasons therefor. On March 5, 1906, defendant wrote to plaintiff:

"We have your letter of the 1st inst., and will say that we do not wonder at your being nonplussed at the wire sent you. We were compelled, however, to send this wire through

the owners of the mill. They asked it and we simply wired to satisfy them. We knew that you would not cancel the order, nor did we expect to have you. . . . We are pleased to inform you that we have secured one boat for part of the shipment, and will try to secure another one just as soon as it can be had, and hope to be able to ship your full order soon."

Defendant argues that there was no completed contract shown by these letters, for the reason that the following details were never agreed upon between the parties: (1) The time in which the shipment of the lumber was to be made was never agreed upon; (2) the details of the specifications as to the 30,000 board feet of lumber of the dimensions 2x3 was never determined upon by the parties; (3) it was never agreed as to where the tally of the cargo of lumber was to be made; (4) the designated price of the lumber was never fixed, it not being specified whether the price was that at the place from which the lumber was to be shipped or to which it was to be shipped; (5) no place of delivery whatever was determined upon by the parties. It would seem to be a sufficient answer to all these objections to say that they are latent defects which may be proved by parol; and, therefore, if the writings are ambiguous in all these respects, the contract would not be void. But, considering the questions *seriatim*, we find that the letter of January 7 states that the lumber 600 to 800,000 can be delivered in sixty days. But, even if no time was agreed upon, the law would fix a reasonable time. The letter of February 8, 1906, from the plaintiff to defendant, makes it clear that the plaintiff agreed to take 30,000 feet, 2x3 in length from 12 to 36 feet, as defendant desired. The letter of February 12, 1906, defendant to plaintiff, concedes that the tally and inspection were to be made at San Pedro. The price of the lumber was fixed at \$14,211.45. Whether this was the net price at the mill or the gross price at the point of delivery, in the absence of a specific agreement, would depend upon custom, and might be proved as any other fact in the case, by parol evidence.

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We are clear, for these reasons, that a binding contract was entered into, and the judgment must therefore be affirmed. Neither party shall recover costs in this court.

RUDKIN, C. J., CROW, GOSE, FULLERTON, CHADWICK, and DUNBAR, JJ., concur.

[No. 7575. Decided June 14, 1909.]

L. A. BENDER *et al.*, *Respondents*, v. J. A. RAGAN *et al.*,
Appellants.¹

DEEDS—DELIVERY—PRIORITIES. Leaving a deed for the grantees with the notary who took the acknowledgment is a sufficient delivery to give the same priority over a judgment subsequently filed.

PRINCIPAL AND AGENT—PROOF OF AGENCY—TESTIMONY OF AGENT. An agent is competent to testify to the fact of the agency, such proof not being within the rule that agency cannot be proved by declarations of the agent.

PARTIES—REPRESENTATIONS—SHERIFFS—COSTS. In an action to restrain a sheriff and creditor from making an execution sale of property, the sheriff is the real and not a nominal party in the trespass, and personally liable for the costs of suit.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered April 4, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to restrain an execution sale of real property, and to quiet title. Affirmed.

James W. Bryan, for appellants.

B. B. Crawford, for respondents.

MOUNT, J.—The plaintiffs brought this action to restrain a threatened execution sale of certain real estate in Kitsap county, and, also, to quiet title against a certificate of sale already issued. Issues of fact were joined, and a trial resulted in a judgment as prayed for in the complaint. The defendants have appealed.

¹Reported in 102 Pac. 427.

A motion to strike the statement of facts is made, but there is no merit in the motion, and we shall not consider it further.

The only issue in the case at the trial was whether a deed executed by the grantors was delivered to respondents prior to the filing of a judgment against the grantors in Kitsap county. The trial court found that the deed was delivered prior to the filing of the judgment, and that the respondents were innocent purchasers for value. After reading the evidence, we are satisfied that the court could not have found otherwise. The notary who took the acknowledgment testified that the deed was left with him for the respondents.

Appellants argue, and cite some authorities to the effect, that agency cannot be proved by the declaration of the agent. That rule has no relevancy to this case, because here the agent himself testified directly as to his authority. He was competent to so testify, as much as the principal. This is not a case where the declarations of the agent are sought to be proved by third persons to show agency. The best evidence of that fact is the testimony of the agent or the principal. In this case we have the evidence of both to the same effect.

Appellants complain because a personal judgment was entered for costs against the sheriff. It is claimed that the sheriff is only a nominal party. While it is no doubt true that the sheriff here is acting at the instance of the judgment creditor, he is the real party in the trespass in this case, and is, therefore, primarily liable. *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260. This case is not controlled in this respect by the rule in mandamus cases cited by appellants, where the judge of the court is a mere nominal party and, therefore, not liable for costs.

We find no error in the record, and the judgment must therefore be affirmed.

ALL CONCUR.

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Opinion Per Gose, J.

[No. 7340. Decided June 14, 1909.]

**ADDIE K. SHERMAN, *Appellant*, v. MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK, *Respondent*.¹**

INSURANCE—POLICY—STIPULATION FOR CANCELLATION—CONTRACT FOR LOAN—PLEDGES. A stipulation in a life insurance policy, pledged as security for a loan, authorizing the company, upon a default, to cancel the policy without notice, and apply the cash surrender consideration to the payment of the loan, is valid; and where the loan equals the cash surrender value, the insured's rights are terminated by cancellation of the policy after default.

SAME—WAIVER—EXTENSION OF TIME. In such a case, extension of the loan for one year is not a waiver of the stipulation authorizing a cancellation, where the insured was not misled, and appears to have treated his rights as terminated.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered April 2, 1908, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on a policy of life insurance. Affirmed.

Herbert N. DeWolfe, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

Gose, J.—On the 13th day of April, 1900, the appellant was the owner of a paid-up policy of insurance, for the sum of \$2,000, issued by the respondent upon the life of appellant's husband, payable to the appellant, upon the death of the insured, in ten annual installments. This policy on the date mentioned had a cash surrender value of \$781. On that date the appellant, her husband, and their children, borrowed the sum of \$781 from the respondent, and agreed to repay the same on September 19, 1900. As security for the payment of such loan, the appellant, her husband, and their

¹Reported in 102 Pac. 419.

children, assigned the policy to the respondent. Among others, the assignment contained the following stipulation:

"In the event of default in the payment of said loan on the date hereinabove mentioned, the company is hereby authorized at its option without notice and without demand for payment, to cancel said policy and apply the customary cash surrender consideration then allowed by the company for the surrender for cancellation of similar policies, viz., \$781, to the payment of said loan with interest, the balance if any to be payable to the parties entitled thereto, on demand."

Upon the maturity of the debt, by the agreement of the parties, the date of payment was extended to March 19, 1901, and the interest was paid to that date. Two interest payments were made, the first in the sum of \$16.93, interest to September 19, 1900; the second, \$19.53, interest to March 19, 1901. The first interest payment was deducted from the sum loaned. The second was paid as advance interest, in order to secure the extension of the date of payment to March 19, 1901. No other payments were made or tendered, either of interest or upon the principal. On May 2, 1901, the respondent cancelled the policy, claiming to act pursuant to the stipulation in the assignment. On June 11, 1904, the insured died, and on July 15, 1907, this action was instituted, charging that the respondent had wrongfully converted the policy. On June 23, 1904, the respondent, in answer to the appellant's inquiry of date June 16, 1904, as to the status of the policy, advised her that it had cancelled the same for nonpayment of the loan, on the 2d day of May, 1901. This was the first communication between the parties subsequent to the extension agreement of September, 1900. The case was tried to the court, and resulted in a judgment in favor of respondent. From such judgment, this appeal has been taken. Among other things the court found, "that on said 13th day of April, and said 2d day of May, 1901, the sum of \$781 was the full cash surrender value of said policy."

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Opinion Per Gose, J.

The appellant urges that the judgment is erroneous upon four grounds; (1) that the forfeiture clause in the assignment is void; (2) that it was incumbent upon the respondent to give notice to the appellant of the amount due upon the loan at the date of its maturity, and that she had a reasonable time to redeem after receiving such notice; (3) that the extension of the date of payment from September 19, 1900, to March 19, 1901, operated as a waiver of the respondent's right to declare a forfeiture; (4) that the right having once been waived could not be revived.

The view we take of the case will dispense with the necessity of considering these propositions separately. We think the applicable principles of law are well settled. It is true, as the appellant urges, that the general rule is that a contract whereby the pledged property becomes forfeited to the pledgee for the nonpayment of the debt at its maturity, is void on the ground of public policy. Denis, *Contract of Pledge*, § 302. The reason for the rule is that, in most instances, the disparity between the amount of the loan and the value of the security is so great as to make such a contract unconscionable. It is a rule proceeding from equitable principles and, like other equitable rules, where the reason ceases the principle fails of application. It is competent for the parties to the contract to stipulate that the pledgee may buy the securities at private sale at the market price, in case of default in payment of the debt, or that he may sell at public or private sale with or without notice, and that he may become the purchaser. Denis, *Contract of Pledge*, § 311; Edwards, *Bailments*, § 284; *In re Martens*, 144 Fed. 818; *Toplitz v. Bauer*, 161 N. Y. 325, 55 N. E. 1059; *Williams v. United States Trust Co.*, 133 N. Y. 660, 31 N. E. 29; *Manning v. Shriver*, 79 Md. 41, 28 Atl. 899.

In such case, the pledgee is treated as the trustee of the pledgor, and is held to the rule of good faith. Not only did the parties stipulate in the assignment that the cash surrender value of the policy was \$781, but, at the time of the trial,

they further stipulated that such was its value at the time the loan was made, according to the books of the respondent. Indeed, it may be said that there is nothing in the record which rises to the dignity of evidence tending to show that, at such time or upon the date of its cancellation, it had any greater value. As we have seen, the rule that forbids the parties to stipulate for the forfeiture proceeds from equitable principles, to the end that the creditor may not make an unconscionable contract with one in necessitous circumstances. We have seen that an agreement which permits the creditor to take the security at the time of default at its market value has the sanction of law. In effect that is what the respondent did. The policy had no market value in excess of the surrender value. We must determine the rights of the parties from the ultimate result of what was done, rather than the form employed to accomplish the result. Measured by this rule, the acts of the respondent have the sanction of law.

In *Du Brutz v. Bank of Visalia*, 4 Cal. App. 201, 87 Pac. 467, 469, the insured and his beneficiary had assigned a policy drawn for \$5,000, as collateral security. The assignee converted it into a paid-up policy drawn for \$2,850, pursuant to one of its provisions, without the knowledge of the assignors, and applied it on the debt which the policy was pledged to secure. Under the assignment, the assignee might have paid the premium and kept the policy alive for the full amount of \$5,000, but it chose to exchange it for a paid-up policy. At page 468, the court said:

"The debt was due, and to have put the policy up and sold it would have been an idle thing, as it could not have brought more than its face value, the assured being still alive."

See, also, *Palmer v. Mutual Life Ins. Co.*, 38 Misc. Rep. 318, 77 N. Y. Supp. 869.

We have seen that, for more than three years before the death of the insured, no payments were made on the loan, and

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Opinion Per GOSK, J.

there was no inquiry concerning the policy. Again, the suit was not commenced for more than three years after the appellant had notice of the fact and the date of the cancellation. The facts and circumstances are more in consonance with the view that the appellant and her husband treated their rights as terminated, than that they regarded the obligation as a subsisting one against the company. The appellant and her husband could not ignore their obligation to pay the debt, and take shelter behind the proposition that without notice they had no means of knowing the amount due.

Finally, the appellant urges that the one extension of the date of payment was a waiver of the clause in the assignment. The authorities cited in support of the contention announce the familiar equitable principle that, where a party is misled to his disadvantage by the acts and conduct of another, the party misleading him will not be permitted to make a claim not in harmony with his acts. The failure of the appellant to redeem the policy before its cancellation did not result from any misconduct on the part of the respondent. She had the option to pay the debt and redeem the policy. Failing in this we cannot, under the facts and circumstances in this case, hold the respondent liable in damages.

The judgment will therefore be affirmed, and the respondent will recover its costs.

RUDKIN, C. J., FULLERTON, CROW, MOUNT, CHADWICK, MORRIS, and DUNBAR, JJ., concur.

[No. 7624. Decided June 14, 1909.]

THE STATE BANK OF WASHINGTON, *Respondent*, v. SPOKANE-COLUMBIA RIVER RAILROAD AND NAVIGATION COMPANY, *Appellant*.¹

CORPORATIONS—CONTRACTS—EXECUTION OF NOTE—OFFICERS—GENERAL POWERS. There is sufficient *prima facie* evidence of the execution of a note by a corporation, where it is shown that the note was given for obligations of the corporation, and was executed by an officer to whom the trustees had intrusted the sole management of its financial affairs.

APPEAL—REVIEW—HARMLESS ERROR—WITNESSES—IMPEACHMENT. It is not prejudicial error to sustain objections to questions tending to impeach a party's own witness, claimed to be prejudiced, where he had in effect fully answered a similar question, and the facts were otherwise established so that his evidence would not have changed the result.

NEW TRIAL—NOTICE OF HEARING—NECESSITY. The statute does not require formal three days' notice of the hearing of a motion for a new trial to be served upon the party making the motion.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered October 24, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

B. C. Mosby, for appellant.

Cullen & Dudley and *Samuel R. Stern*, for respondent.

FULLERTON, J.—The State Bank of Washington, a banking corporation, brought this action against the Spokane-Columbia River Railroad and Navigation Company to recover upon certain obligations which it alleged were due and owing to it by the railroad company. Subsequent to commencing the action, it became insolvent and Horace Kimball was appointed its receiver. The railroad company also became insolvent at about the same time, and B. C. Mosby was

¹Reported in 102 Pac. 414.

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appointed its receiver. The obligations sued upon were five in number, a promissory note for \$300, an interest account of \$800, an overdraft of \$592.63, a promissory note for \$28,657.80, and a draft, paid by the bank at the request of the railroad company, in the sum of \$2,266.34. The receiver for the railroad company, answering in its behalf, admitted the railroad's liability on the first, second, third and fifth of these obligations; but for answer to the fourth, denied that the note was the note of the defendant corporation, and averred that for its execution there was no consideration save an indebtedness of slightly over \$6,000, which indebtedness included the principal sums in the other four obligations mentioned. The affirmative matter in the answer was put in issue by a reply, and a trial had before the court without a jury, resulting in findings in favor of the plaintiff for the several sums admitted, and for \$26,891.45 on the disputed item. From a judgment entered in accordance therewith, the receiver for the railroad company has appealed.

The first error assigned relates to the admission of the disputed note in evidence—the contention being that the note was not shown to have been executed by direction of the trustees of the corporation, or under their authority. But there was evidence tending to show that the note was executed for obligations of the corporation, and evidence that it was executed by a trustee who was secretary and treasurer of the corporation, and the trustee to whom the other trustees had intrusted the sole management of the corporation's financial affairs. This was a sufficient showing to authorize the introduction of the note in evidence, and sufficient to hold the corporation, until, at least, an affirmative showing was made to the effect that the note was not the note of the corporation. As we said in *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 162, 89 Pac. 495:

“When a corporation allows a person in a large measure to control its business transactions, it must be held respon-

sible for his acts in the name of the corporation, until it has been affirmatively shown that such acts were unauthorized."

To an understanding of the second assignment, a short statement of the proceedings had at the trial is necessary. As a part of its evidence in chief, the respondent called as a witness one E. W. Swanson, who testified that he was the officer of the corporation who executed the disputed note in suit, and to facts tending to show its due execution. He was not cross-examined by the appellant. After the respondent had rested its case, the appellant called Mr. Swanson as a witness on its own behalf. In answer to questions put to him by counsel, he stated that he was president of the respondent bank, as well as secretary and treasurer of the appellant railroad company; that overdrafts and previous notes given formed the consideration for the notes in suit, and that these were given for construction work on the road, to pay for work on the road, and to pay the incidental expenses in connection with building the line; and that he knew when the note was given the exact amount of indebtedness the railroad company owed the bank. Thereupon the following occurred:

"Q. Mr. Swanson, I will ask you whether or not in the trial of the case of the Farmers & Mechanics Bank against Strahorn, in which I intervened as Receiver of this Railroad, you did not testify that you did not know that the indebtedness from the Road to the bank was \$15,000? Mr. Dudley: I object to it, this is Mr. Mosby's witness. Mr. Mosby: This is an anomalous condition of affairs. Mr. Dudley: He cannot impeach his own witness. Mr. Mosby: I do not want to impeach him, but I want the facts brought out to the Court. Mr. Stern: It cannot be for any other purpose. The Court: Objection sustained. Q. Mr. Swanson, do you or do you not know that the indebtedness from the Spokane & Columbia River Railroad & Navigation Company to the State Bank of Washington was or was not over \$6,000 at the time this note was given? A. I know it was over \$6,000. Q. Do you know how much over \$6,000, Mr. Swanson? A. Why I can't state the exact figures. Q. Now, as the Secretary and Treasurer of the Railroad Company, Mr. Swanson, I want to impeach your

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testimony as the President of the State Bank of Washington. Don't you know as a matter of fact that there was no such indebtedness existing from the railroad company to the bank as that note shows at the time that the note was given by the railroad company to the bank, at the time it was given? A. No, sir, I do not. Q. What? A. No, sir. Q. Mr. Swanson, didn't I ask you, on the trial of the case before Judge Huneke, being the case of the Farmers & Mechanics Bank against Strahorn, in which I intervened as Receiver, whether or not the indebtedness from the road to the bank was \$15,000 and didn't you say that you did not know? A. Yes, sir, I believe I stated so. Q. Well, have you gotten any information since then that you had not at that time? A. No, not particularly, I don't think. I stated to you at that time that I did not think this note, that the indebtedness to the road was as large as his note. Q. Mr. Swanson, referring to the matter of your testimony in the case of the Farmers & Mechanics Bank against Strahorn, in which I intervened, you did not know at that time that the indebtedness from the road to the bank was \$15,000, did you? Mr. Dudley: I object to it. The Court: That is the same thing, you are cross examining your own witness. Mr. Mosby: He is, as I say, the whole thing in the railroad company and the whole thing in the bank and has given a note from himself to himself. The Court: When you make him your witness, you are bound by what he says whether as the Secretary and Treasurer of the Railroad Company or as the President of the State Bank. You are bound by whatever he says. He cannot swear one way as one thing and another way as another. Now, you are asking him to impeach himself. Mr. Mosby: I am not impeaching Mr. Swanson, but I do not understand that I am estopped from showing that the witness has made contradictory statements proving that the facts were different from what he now says they are. The Court: As your witness? Mr. Mosby: Yes, sir. The Court: You cannot contradict your own witness unless you can show that he is a prejudiced witness. Mr. Mosby: May it please the Court, I am showing he is prejudiced and hostile inasmuch as he is representing the plaintiff in this case. The Court: That don't make him a prejudiced witness. Mr. Mosby: His interests are inimical to that of the railroad company in this case. The Court: He is

now your witness. Awhile ago he was their witness, now he is your witness."

Thereupon the objection was sustained. The refusal of the court to allow the appellant to examine the witness as to his statements made in the former hearing constitute the error here assigned.

The better rule undoubtedly is, that a party who has been surprised at the unfavorable testimony of a witness he has called in his own behalf, may ask such witness whether he has not made contradictory statements at other times and places, and if the witness denies it, show by other evidence that he has made such statements; and in this case it would have been proper to have permitted the witness to answer the questions to which objections were made. However, we do not think the error prejudicial in this instance. In substance the witness did testify that he had answered at another time and place that he did not know whether the indebtedness of the railroad company to the bank was as much as \$15,000, and had he answered the questions here propounded to him affirmatively, he could have said but little more. The proofs of the indebtedness and the genuineness of the note did not depend entirely upon the testimony of this witness. The cashier of the bank was sworn and testified not only to the execution of the note, but to the fact that it was executed to take up the indebtedness of the railroad company to the bank. No evidence was offered in opposition to this testimony, and indeed counsel representing the railroad stated he had no evidence which directly impugned the validity of the note. This being true, it would be useless to send the case back for a new trial, as the result must be the same no matter how the witness might answer the question excluded.

The third assignment is based on the contention that it was not proven that the railroad company had in reality received full value for the note sued upon. But without reviewing the evidence at length, it is our opinion that the evidence decidedly preponderates in favor of that conclusion. This

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case does not differ, in respect to the proofs required to maintain it, from that of any other civil action at law to recover money. The burden was on the plaintiff to maintain its allegations by a preponderance of the evidence. As we think it did this, we hold it entitled to recover.

The appellant, after the court had announced its decision, filed a motion for a new trial. This motion was taken up and heard without the formal three day's notice being served upon it, although its counsel was given notice of the hearing and an opportunity to present the motion formally. The court in ruling that the formal notice was unnecessary followed the case from this court of *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363, which holds that a party filing a motion for a new trial is not entitled to notice of the time of hearing the motion. The appellant seeks to escape the force of the decision by showing a change in the wording of the statute on which the decision was based made subsequent to the decision. But the change as we read it does not affect this question, and on the authority of that case, we hold formal written notice unnecessary.

The judgment will stand affirmed.

ALL CONCUR.

[No. 7928. Department One. June 14, 1909.]

SARAH L. STAY, *Appellant*, v. ANDREW H. STAY,
Respondent.¹

DIVORCE—JUDGMENT—RES JUDICATA. A judgment dismissing an action for divorce, based on the ground of cruelty, is *res judicata* and a bar to another action based upon acts of cruelty that occurred prior to the time of the trial.

SAME. Where a wife left her home and at once brought action for divorce on the ground of cruelty, dismissal of the action on the merits and a finding that the defendant was not at fault, is *res judicata* and a bar to an action for a divorce on the grounds of constructive abandonment by reason of cruelty and of failure to support since the former action, in the absence of any showing that the wife attempted to return and receive support at home.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 2, 1908, upon sustaining defendant's motion for judgment on the pleadings, dismissing an action for divorce. Affirmed.

E. P. Dole, *J. E. McGrew*, and *H. U. Woodin*, for appellant, contended, among other things, that where the husband turns the wife out, he is guilty of abandonment at the end of the statutory period. *Jones v. Jones*, 95 Ala. 443, 11 South. 11, 18 L. R. A. 95; *Starkey v. Starkey*, 21 N. J. Eq. 135. There was a constructive abandonment. *Holston v. Holston*, 23 Ala. 777; *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Warner v. Warner*, 54 Mich. 492, 20 N. W. 557; *Weigand v. Weigand*, 41 N. J. Eq. 202, 3 Atl. 699; *Id.*, 42 N. J. Eq. 699, 11 Atl. 113; *Skean v. Skean*, 33 N. J. Eq. 148; *Palmer v. Palmer*, 22 N. J. Eq. 88; *Marker v. Marker*, 11 N. J. Eq. 256; *Waltermire v. Waltermire*, 110 N. Y. 183, 17 N. E. 739; *Setzer v. Setzer*, 128 N. C. 170, 38 S. E. 731, 83 Am. St. 666; *High v. Bailey*, 107 N. C. 70, 12 S. E. 45; *Wood v. Wood*, 27 N. C. 674; *Sisemore v. Sisemore*, 17 Ore. 542,

¹Reported in 102 Pac. 420.

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Citations of Counsel.

21 Pac. 820; *Howe v. Howe*, 16 Pa. Super. Ct. 193; *Camp v. Camp*, 18 Tex. 528; *Almond v. Almond*, 4 Rand. 662, 15 Am. Dec. 781. The former judgment is not a bar, since cruel acts, as a matter of law, may not be ground for a divorce, but at the expiration of a year may constitute constructive abandonment. *Rand v. Rand*, 58 N. H. 536. The wife is not held to the same accountability as the husband in seeking a reconciliation. *Millowitsch v. Millowitsch*, 44 Ill. App. 357; *Sargent v. Sargent*, 36 N. J. Eq. 644.

Douglas, Lane & Douglas, for respondent, contended. *inter alia*, that the judgment in the former suit is conclusive as to all matters which were litigated and also as to all matters which might have been litigated therein. *Sweeney v. Waterhouse & Co.*, 43 Wash. 613, 86 Pac. 946; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Howard v. Huron*, 6 S. D. 180, 60 N. W. 803, 26 L. R. A. 498; *Tucker v. Carr*, 20 R. I. 477, 40 Atl. 1, 78 Am. St. 893; *Royston v. Horner*, 86 Md. 249, 37 Atl. 718, 63 Am. St. 510; *Miller v. Miller*, 92 Va. 196, 23 S. E. 232; *Haltenhof v. Haltenhof*, 44 Ill. App. 135; *Smith v. Smith*, 101 Ill. App. 187; *Lewis v. Lewis*, 106 Mass. 309; *Edgerly v. Edgerly*, 112 Mass. 53; *Brown v. Brown*, 37 N. H. 536, 75 Am. Dec. 154; *Fera v. Fera*, 98 Mass. 155; *Vance v. Vance*, 17 Me. 203; *Tillison v. Tillison*, 63 Vt. 411, 22 Atl. 531. If in any case a wife may separate from her husband and at the end of the statutory period sue for a divorce on the grounds of desertion, the conduct of the husband complained of must be such as itself to constitute grounds for a divorce. *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737; *Van Dyke v. Van Dyke*, 135 Pa. St. 459, 19 Atl. 1061; *Sowers' Appeal*, 89 Pa. St. 173; *Eshbach v. Eshbach*, 23 Pa. St. 343; *Laing v. Laing*, 21 N. J. Eq. 248; *Dwyer v. Dwyer*, 16 Mo. App. 422; *Fritz v. Fritz*, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. 156; *Walton v. Walton*, 114 Ill. App. 116; *Lynch v. Lynch*, 33 Md. 328; *Lammertz v. Lammertz*, 59 N. J. Eq. 649, 45 Atl. 271; *Plimley v. Plimley*, 35 N. J. Eq. 18; *Stiles v. Stiles*, 52 N. J. Eq. 446, 29 Atl.

162; *Farrier v. Farrier* (N. J.), 58 Atl. 1079; *Pierce v. Pierce*, 33 Iowa 238; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12; *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11; *Padelford v. Padelford*, 159 Mass. 281, 34 N. E. 336; *Pidge v. Pidge*, 3 Met. 257.

CHADWICK, J.—On or about July 20, 1907, plaintiff left her home, and a day or two later commenced an action for divorce against her husband. The grounds of her complaint were cruel and inhuman treatment and personal indignities rendering her life burdensome. The case was tried in the superior court of King county, and on the 22d day of April, 1908, a decree was entered denying plaintiff's complaint. No appeal was taken from this decree.

On July 7, 1908, she began another action against defendant, praying for a divorce, alleging in detail a number of instances of alleged cruelty and personal indignities, one of which was that "on the 17th day of July, 1907, said defendant Stay carried away and destroyed most of the plaintiff's clothing, drove the plaintiff from her home—the community property of the plaintiff and defendant Stay—saying to her: 'If you value your life, God damn you, take your clothes and leave and never come back again.'" Before issue had been joined, plaintiff filed a supplemental complaint, the preamble of which is as follows: "Sarah L. Stay for a further and additional and supplemental cause of action accruing and matured since the service and filing of the original complaint herein, complains against Andrew H. Stay," etc. In this complaint she reiterates the same charges of cruelty as a justification for her leaving her home and upon them based a charge of constructive abandonment, which charge she submits as the basis of her supplemental complaint. Defendant answered, denying specifically each of the charges of cruelty as well as the abandonment, and further charging that in fact the plaintiff had abandoned defendant. The former action was also pleaded in bar of the present action. The new

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matter was denied by plaintiff in her reply, and of the plea in bar she said:

"Replying to paragraph IV of the defendant's second affirmative answer and defense herein, the plaintiff denies that her present suit for divorce is based upon the same grounds as that referred to in said paragraph, and alleges that it is founded among other things upon refusal to support the plaintiff subsequent to the termination of the said first action for divorce and upon the ground of abandonment for more than one year, accruing subsequent to the termination of said first action for divorce and prior to the service and filing of the supplemental complaint herein."

Upon this record the court entertained and granted a motion for judgment on the pleadings, and dismissed the action. This judgment we are asked to reverse.

While the assignments of error are numerous, they all go to, or depend upon, the judgment of the court that the former trial was *res judicata* of the present action. Reliance is placed upon that part of the reply wherein appellant alleges that the present action is founded, among other things, upon refusal to support the appellant subsequent to the determination of the first action, and upon the ground of abandonment for more than one year, accruing subsequently to the determination of the first action and prior to the filing of the supplemental complaint. It is also complained that the finding of the court in the first trial, that respondent had treated his wife kindly, was *obiter* and no bar to the present action.

Pleadings are not to be measured by the conclusions drawn by the pleader, but by certain fixed rules of law and practice, and when this record is so measured, the judgment of the lower court must be sustained. Appellant had brought an action for divorce upon the ground of cruelty, and her complaint was broad enough to admit proof of every fact alleged in support of her present action. She tried the first case upon her own theory, and if the evidence was sufficient, and we must presume it was, to warrant the court in finding

the respondent not guilty, the legal conclusion follows as of course that she was not justified in leaving her husband and her home. The charge of abandonment was a legal conclusion that the court rightly rejected in applying the usual test put upon pleadings when determining the plea of former adjudication. She alleges no fact that could not have been alleged in the former case, since every act of cruelty relied upon in this action had occurred prior to the time of that trial, and was, or might have been, litigated. The legal effect of appellant's present petition, when reduced to its lowest terms, is to ask the court to draw a different conclusion of law from the same facts, for it must be admitted that the same evidence would be required to sustain this suit that was adduced in the former trial.

The fact that respondent refused to support appellant subsequent to the first action cannot avail her as a present ground for divorce. Under the circumstances disclosed, he was not bound to do so. It had been judicially determined that he was not at fault and that she was. It was therefore her duty to return to her home, and there demand the support to which she would be entitled while performing her service to the community and her duty as a helpmeet to her husband. The duty of maintaining the home is put upon the husband. So long, then, as he is not at fault, a corresponding duty of living in and keeping the home is on the wife. The home is itself an invitation to her, and in the absence of a showing in the pleadings that she at least attempted to perform her duty to her spouse, as formally adjudicated, she can claim no right of support while living separate and apart from him. In fact, appellant abandoned the home, but she insists that in law the husband abandoned her; that her going was the result of his cruel treatment. Constructive abandonment depends, not upon the mere going with intent to desert the spouse as in the ordinary case, but upon conduct which makes the association no longer tolerable. The pleadings show that the husband had been guilty of no overt

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Syllabus.

act of wrongdoing before or after her going, and the conclusion reached by the trial court follows as a just conclusion of law. We do not attach any importance to the proposition that the finding of the court that respondent treated his wife kindly is dictum. It is but the converse of the finding that respondent was not guilty of cruelty, which was the only issue then before the court.

Much space is devoted by counsel in their briefs to a discussion of the proposition that a plea will not be allowed upon the ground of constructive abandonment, unless the acts of cruelty inducing the abandonment were in themselves sufficient to warrant a decree upon the ground of cruelty. This we do not feel called upon to determine in this case; for, as we have suggested, the issue is one of law and not of fact, and the only question open for the court below and for us is, was the former decree *res judicata* when considered in the light of the facts disclosed by the pleadings. We decide that it was.

Judgment affirmed.

RUDKIN, C. J., GOSE, and FULLERTON, JJ., concur.

MORRIS, J., took no part.

[No. 7931. Department Two. June 14, 1909.]

GEORGE M. WINTERMUTE, *Respondent*, v. STANDARD
FURNITURE COMPANY, *Appellant*.¹

TRIAL—NEW TRIAL—CONDUCT OF JURY—DEPOSITIONS IN JURY ROOM—HARMLESS ERROR. The inadvertent presence of depositions in the jury room, prohibited by Bal. Code, § 5004, is not prejudicial error as ground for a new trial, where the jury did not consult them or know of their presence.

EVIDENCE—TO VARY WRITTEN CONTRACTS. Oral evidence modifying and explaining certain letters is not inadmissible as varying a written contract, where the letters did not constitute the contract, which was oral, but only tended to show its nature and extent.

¹Reported in 102 Pac. 443.

Appeal from a judgment of the superior court for King county, Rice, J., entered November 2, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Richard Saxe Jones, for appellant.

Pemberton & Sather and Todd, Wilson & Thorgrimson, for respondent.

PARKER, J.—In this action the plaintiff seeks to recover from the defendant compensation for services rendered and money expended, for and at the instance of the defendant. A trial was had before a jury, resulting in a verdict and judgment favorable to the plaintiff and against the defendant, from which it appeals to this court.

When the jury retired to consider of their verdict, certain depositions which had been read in evidence were taken to the jury room by mistake, but were not examined by the jury. A large number of papers and books used upon the trial were taken to the jury room, and none of the jurors knew whether the depositions were among such papers or not. None of the papers were examined by any member of the jury, save the amended complaint, which was read to the jury by the foreman in order that they might know the amount claimed by the plaintiff. These facts were clearly established by the affidavits of all the jurors, which affidavits were used upon the hearing of the defendant's motion for a new trial, which the court denied.

Counsel for defendant and appellant contends that the presence of these depositions in the jury room during the deliberations of the jury was such a violation of its rights as to entitle it to a new trial under § 618 of Pierce's Code (Bal. Code, § 5004), which reads:

"Upon retiring for deliberation, the jury may take with them the pleadings in the cause, and all papers which have been received as evidence on the trial (except depositions), or copies of such parts of public records or private documents

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given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession."

It is earnestly argued that the language of this section constitutes an absolute prohibition against the presence of depositions in the jury room. It is true that, when read literally, the section might be held as meaning all that is claimed by appellant, but to so construe and apply it here would be to lose sight of its evident spirit and purpose, which clearly is to keep from consideration of the jury, after they retire, written evidence in the form of depositions which they have already heard read with other oral evidence upon the trial, thus preventing such depositions having undue weight and consideration beyond that of other evidence given orally, which from necessity must be considered by the jury from memory only. Since these depositions were accidentally in the jury room and their presence there unknown to the jury, it is impossible to conceive of how the appellant could have been prejudiced, or how the spirit of the law could have been violated. As was said by this court in *Dennis v. Moses*, 18 Wash. 537, 559, 52 Pac. 333, 40 L. R. A. 302: "The general purpose or spirit of the act must always be held in view, and absurd or oppressive consequences avoided as far as possible." Touching the effect of the presence in the jury room of prohibited documents which are not read by any of the jurors, the rule is stated in *Thompson on Trials*, § 2590, as follows:

"If the paper was taken out by mistake, and not by the fraud or design of the prevailing party, or his counsel, and if it was not in fact read by the jury, then there is no occasion to grant a new trial; since no harm has been done to the party against whom the verdict was rendered, and the other party has done no wrong for which he is to be punished. And the rule is the same where it is made to appear that the only jurors who read the objectionable paper had already agreed to return the verdict which was rendered. As the affidavits of jurors are generally admissible to sustain their verdicts, it may be shown by such evidence that the paper was not in fact read by any of the jury."

Authorities to the same effect will be found collected in 29 Cyc. 809, and 12 Ency. Plead. & Prac., 559, 604.

It is also contended by appellant that error was committed by the trial court in permitting the plaintiff, over objection of defendant, to introduce evidence varying the terms of the contract sued upon. This contention is based upon the assumption that the contract of employment was in writing. It seems quite clear to us, however, that the contract upon which plaintiff sued was oral. It is true that some letters were introduced in evidence which appellant's counsel contends show the nature and extent of the contract, but we think they go no farther; in any event, than having a tendency to show certain admissions on the part of plaintiff as to the arrangement existing between him and the defendant touching his employment. They do not, in our opinion, constitute the contract. Hence, the parol evidence introduced by the plaintiff, though in some degree tending to modify and explain these letters, did not violate the rule which appellant here invokes.

The other assigned errors rest upon the alleged insufficiency of the evidence to sustain the jury's findings, and also the giving of instructions to the jury. We have reviewed all of the evidence and instructions in the record and find nothing therein warranting our interference with the final disposition of the case by the jury and trial court. We do not regard these alleged errors such as require us to review them in detail.

We find no prejudicial error in the record, and the judgment of the trial court is affirmed.

RUDKIN, C. J., CROW, MOUNT, and DUNBAR, JJ., concur.

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Statement of Case.

[No. 7981. Department Two. June 14, 1909.]

THE STATE OF WASHINGTON, *on the Relation of George F. Vanderveer as Prosecuting Attorney for King County, Appellant*, v. MATT H. GORMLEY, *Respondent*.¹

OFFICERS—COUNTIES—TREASURER—TERM OF OFFICE—VACANCY. Under Bal. Code, § 425 providing for the election of a county treasurer "who shall hold office for the term of two years, and until his successor is elected and qualified," and Bal. Code, § 1548, providing that every office shall become vacant upon the incumbent's refusal or neglect to take his oath of office or give or renew his official bond, no vacancy occurs authorizing an appointment by the county commissioners, upon the refusal of an officer elect to qualify, since he was not an "incumbent"; and the term of his predecessor continues until a successor, "elected" by the same electoral body which elected the incumbent, has qualified (Dunbar and Fullerton, JJ., dissenting).

SAME—TERMS—HOLDING OVER—SUCCESSIVE TERMS. Const. art 8, § 6, providing for the biennial election of county officers, and art. 11, § 5, providing that no county officer shall hold office for more than two terms in succession, does not prevent the legislature from making the term of office two years and "until his successor is elected and qualified"; nor does it prevent a second term incumbent from holding over for two years more, on the refusal of his successor to qualify (DUNBAR and FULLERTON, JJ., dissenting).

COURTS—APPELLATE COURTS—ORGANIZATION—SEPARATE DEPARTMENTS—QUORUM. Under Const., art. 4, § 2, providing for five judges of the supreme court "a majority of whom shall be necessary to form a quorum," and which further provides that the legislature may increase the number of judges, "and may provide for separate departments," it was competent for the legislature, by Laws 1909, pp. 33-37, to increase the number to nine judges, and provide for two departments of the court, consisting of five judges each, three of whom shall constitute a quorum for the transaction of business in a department; and a litigant is not entitled, as a matter of right, to a rehearing by the full court sitting *en banc*, authorized by section 4 of the act.

Appeal from a judgment of the superior court for King county, Gay, J., entered February 18, 1909, in favor of the defendant, after a trial upon stipulated facts, dismissing proceedings in the nature of *quo warranto*. Affirmed.

¹Reported in 102 Pac. 435.

George F. Vanderveer, Robert G. Prigmore, S. G. Murray, and Walter S. Fulton, for appellant. Upon failure of an officer-elect to qualify, the county commissioners could declare a vacancy. *King County v. Ferry*, 5 Wash. 536, 32 Pac. 538, 34 Am. St. 880, 19 L. R. A. 500; *Ballard v. Thompson*, 21 Wash. 669, 59 Pac. 517; *State ex rel. Lysons v. Ruff*, 4 Wash. 234, 29 Pac. 999, 16 L. R. A. 140. The statute creating a vacancy when an officer fails "to give or renew" his official bond, applies to an officer-elect. *County of Wapello v. Bigham*, 10 Iowa 39, 74 Am. Dec. 370; *State ex rel. Lutfing v. Goetze*, 22 Wis. 348; *State ex rel. Attorney General v. Matheny*, 7 Kan. 327. A statute authorizing an officer to continue in office for a specified term, "and until his successor is elected and qualified" does not authorize the holding over for another entire term. *County of Scott v. Ring*, 29 Minn. 398, 13 N. W. 181; *Welch v. Seymour*, 28 Conn. 387; *Mayor etc. of Rahway v. Crowell*, 40 N. J. L. 207, 29 Am. Rep. 224; *Mayor of Wilmington v. Horn*, 2 Harr. (Del.) 190; *Dover v. Twombly*, 42 N. H. 59; *State Treasurer v. Mann*, 34 Vt. 371, 80 Am. Dec. 688; *County of Wapello v. Bigham, supra*; *Bigelow v. Bridge*, 8 Mass. 274; *Chelmsford Co. v. Demarest*, 7 Gray 1; *Mutual Loan & Building Ass'n v. Price*, 16 Fla. 204, 26 Am. Rep. 703; *Harris v. Babbitt*, 4 Dill. 185; *People ex rel. Showers v. Taylor*, 57 Cal. 620; *People ex rel. Drew v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668. There was a vacancy at the end of the two-year term, and although the respondent was in possession, he was not an "incumbent" for another term and was not elected originally for a two-year term and an additional contingent term of two years more. *Adams v. Doyle*, 139 Cal. 678, 73 Pac. 582; *Campbell v. Board of Supervisors* (Cal.), 93 Pac. 1061; *People ex rel. Drew v. Rodgers*, and *People v. Taylor, supra*; *People ex rel. Mattison v. Nye* (Cal.), 98 Pac. 241. The respondent was not eligible to hold over for an additional term. *Pierce's Code*, § 169 (Const., art. 11, § 7); *Mechem, Public Officers*, § 398. The prior in-

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cumbent has no claim to the title of this term; he is a mere *locum tenens* holding the office for public convenience until the vacancy in the term is filled. *Gosman v. State*, 106 Ind. 203, 6 N. E. 349; *Smith v. Moore*, 90 Ind. 294; *People ex rel. Drew v. Rodgers, supra*; *People ex rel. Kelly v. Common Council*, 77 N. Y. 503, 33 Am. Rep. 659. "Election" and "appointment" are synonymous as used in this connection. *People ex rel. Aylett v. Langdon*, 8 Cal. 1.

Bausman & Kelleher and *William Hickman Moore*, for respondent.

PARKER, J.—This is a proceeding in the nature of *quo warranto*, prosecuted in the name of the state upon relation of the prosecuting attorney of King county, for the purpose of ousting the respondent from the office of treasurer of said county. The cause was disposed of in the superior court upon facts stipulated by the parties, which, so far as necessary for our review, are briefly stated as follows: At the general election in the year 1904, the respondent was duly elected treasurer of King county, thereupon duly qualified as such, and held office for the ensuing term commencing on the second Monday of January, 1905. At the general election in the year 1906, the respondent was duly elected treasurer of King county for a second consecutive term commencing on the second Monday of January, 1907, thereupon he duly qualified as such, and has ever since held said office, thereby having become the incumbent for two terms in succession.

At the general election in the year 1908, George F. Russell was duly elected treasurer of King county for the ensuing term, and on the 11th day of January, 1909, being the second Monday of January, and the date upon which the term of office for which he was elected would have commenced, he personally appeared before the board of county commissioners for King county and declared his intention not to take the

oath of office or file the official bond required by law of county treasurers; he having since his election received and accepted the appointment of postmaster of the city of Seattle, which office he now holds. After the 11th day of January, 1909, with the approval of the board of county commissioners, the official bond of the respondent as county treasurer was continued in force, and is now in full force and effect. On the 13th day of January, 1909, the board of county commissioners of King county, in regular session, by resolution declared that a vacancy had occurred in the office of county treasurer by reason of the failure of Russell to qualify, and thereupon appointed J. P. Smith to fill such declared vacancy, and thereupon J. P. Smith took the oath of office, and executed and filed the official bond required by law of county treasurers, and demanded of the respondent that he vacate and deliver up said office and the control thereof, which demand the respondent refused, and continues in possession of said office, performing the duties and functions thereof. Upon these facts the superior court rendered judgment in favor of respondent and dismissed the proceeding, from which the relator appeals to this court.

As stated in appellant's brief, "The sole question in this case is whether or not there was a vacancy in the office of county treasurer of King county on the 13th day of January, 1909, which the board of commissioners was authorized to fill by appointment." Which in turn depends upon the expiration of the second elective term of the respondent as county treasurer. If that term has expired there is a vacancy warranting the appointment of a successor to the respondent; otherwise there is no vacancy to fill and no authority for the appointment. The law which fixes the term of office of county treasurer being § 4224 of Pierce's Code (Bal. Code, § 425), reads as follows:

"Sec. 4224. At the first election in each county, and every two years thereafter, there shall be elected a county treasurer, who shall have the qualifications of a voter, and shall

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continue in office for the term of two years, and until his successor is elected and qualified."

This, it is contended by appellant, must be construed in the light of the provisions of the law relating to vacancies in office, being Pierce's Code, § 4787 (Bal. Code, § 1548), which in so far as applicable here, reads as follows:

"Sec. 4787. Every office shall become vacant on the happening of either of the following events before the expiration of the term of such officer. First, the death of the incumbent. . . . sixth, his refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law."

It is conceded that the power of appointment in case of vacancy resides in the board of county commissioners, so we need not notice the law on that subject. The question then arises upon the concluding words of § 4224, "*For the term of two years, and until his successor is elected and qualified.*" Appellant contending that the word "elected" means "appointed," in the light of § 4787 relating to vacancies; while respondent contends it means "elected by the people," and that until some person qualifies by taking oath of office and giving bond, who has been elected by the people, the term of an incumbent who is in office by election, as he is, is not terminated. The principal here involved has not been before this court under exactly the same condition as this case presents, but it seems to us that the force and effect of the concluding words of § 4224, fixing the term of office, has been clearly settled by this court in the case of *State ex rel. Meredith v. Tallman*, 24 Wash. 426, 64 Pac. 759, where the law fixing the term of county superintendent of schools in almost the exact words here involved, was construed by the court, using this language:

"When, therefore, the legislature used the words, 'whose term of office shall begin on the second Monday in January next succeeding his election and continue for two years and until his successor is elected and qualified,' it was not meant thereby that his term of office should be two years and no

more. The phrase, 'and until his successor is elected and qualified' means something. It was not used idly. If so, the term was not fixed at two years and no more, but was two years and more; the further time depending upon the contingency not only of an election, but also of the qualification of the person elected, which might be one day, one month, or any number of months. A person elected to an office, with the term so fixed at two years and such further time, would be entitled to hold the full two years and such further time, viz., until his successor had been elected and also had qualified."

Numerous authorities are there cited in support of that holding, and they need not be further reviewed by us at this time. In that case the law had been changed so that the term of office commenced in August instead of January, and there was no provision of law providing for the intervening period other than the concluding words of § 4224 above quoted, which were held to extend the term so that no vacancy occurred authorizing the appointment by the county commissioners as they attempted to do in that case. To avoid the force of that decision counsel for appellant argue that that case did not involve any of the events which the law declares shall create a vacancy in office. It seems to us, however, the question of what constitutes the term of office no less depends upon the language of the law defining the term of office. It is not a question of a vacancy occurring under § 4787 so much as it is a question of what is the term of office. We do not think the sixth subdivision of the section relating to vacancies, above quoted, can have any influence upon the tenure of office of one whose term has not expired and who has not neglected to do any of the things therein mentioned. It seems plain under the decision in the *Tallman* case, that the respondent's term of office, since he held by election, in no event expires until his successor is elected and qualified, though he may lose his right to the office by failure to do some of the things prescribed in § 4787, resulting in a vacancy. That law, however, does not pretend to fix the

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duration of the term of office, but only defines the events which result in a vacancy during the term of an incumbent.

Counsel for appellant, however, strenuously argue that the law relating to vacancies should not be given this restricted meaning by applying it only to persons actually in the possession of and performing the functions of office; their principal contention being that the word "incumbent" does not necessarily mean the one who is in possession of the office and performing its functions, but may also mean the one who has been elected and not yet qualified; that any other construction renders a part of the section, at least the sixth subdivision, meaningless; and that the words "his refusal or neglect," etc., can apply only to one who has been elected and not yet qualified.

At first thought the word "incumbent," in connection with this provision, might seem to apply only to persons who are elected and have not yet qualified, but when other possible conditions arising under our laws are noticed, it is easy to see the virtue and force of this provision without giving the word "incumbent" any other than its ordinarily accepted meaning. For instance, it is a matter of common knowledge that an incumbent actually in office is often reelected for a succeeding term. In such case he is not permitted to continue in office upon his former oath and bond but must again qualify. He cannot decline to qualify and continue in office under his former tenure. One in this situation must hold under his new tenure or not at all. The term of office will not expire until the successor, though it be himself, is elected and qualified under the decision in the *Tallman* case, but unless he qualifies under his new tenure, he forfeits the right to hold under either. Again, it seems to be the settled law of this state, that the sureties upon official bonds are not liable for the acts of an incumbent after the expiration of the term as it would expire in the usual course of events by the election and qualification of a successor, that is, the term of the bond ends with the stated portion of the officer's term,

and does not continue through the contingent portion thereof, "until his successor is elected and qualified." *King County v. Ferry*, 5 Wash. 536, 32 Pac. 538, 34 Am. St. 880, 19 L. R. A. 500; *Ballard v. Thompson*, 21 Wash. 669, 59 Pac. 517. And should the elected successor not qualify, resulting in the continuance of the then incumbent's term, such incumbent's right to hold the office would depend upon the renewing of his official bond; and if he failed in this, there would result a vacancy as provided by the sixth subdivision of § 4787 above quoted. Again, the amount of an official bond and the sufficiency of the sureties thereon are not determined once for all at the beginning of a term, but the county commissioners have the power from time to time as they may deem necessary for public security, to require a new or additional bond from the incumbent. Pierce's Code, §§ 3268, 3269 (Bal. Code, §§ 1522, 1523). And a failure of the incumbent to comply with such requirement would result in a vacancy in the office under the provisions above quoted. So it seems to us there is no reason for giving to the word "incumbent" any other than its ordinarily accepted meaning, and this view we think gives to the law relating to vacancies all the force and effect it was intended to have. At the same time it leaves the meaning of § 4224, which fixes the term of office, quite plain, as it was so regarded by this court in the *Tallman* case. By the Standard dictionary the word "incumbent" is defined as "One who holds an office or performs official duties." Decisions from other states have been brought to our notice tending in a measure to support the contention of both appellant and respondent upon this phase of the case, but in view of the plain provisions of our law fixing the elective term, and the former holding of this court in the *Tallman* case as to the force and effect of the words "Until his successor is elected and qualified," we deem it unnecessary to review them here. Whether the word "incumbent" refers exclusively to one actually in possession of the office, or may under certain circumstances refer to one elected and about

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to enter upon the duties of office, it in no event can lessen the duration of the term of the office as plainly fixed by our law.

In view of the holding of this court in the *Tallman* case, it hardly seems necessary to further notice the contention made by appellant to the effect that "appointment" and "election" are the same within the meaning of § 4224 above quoted. There may sometimes in a statute be an indiscriminate use of these words so as to render them in the particular instance substantially synonymous; but when the word "elected" is used in this connection, we believe it is settled, by the weight of authority, that it means elected by the same electoral body which elected the incumbent whose term of office is thus prescribed. As stated by the supreme court of Indiana in *Kimberlin v. State*, 130 Ind. 120, 29 N. E. 773, 30 Am. St. 208, 14 L. R. A. 858:

"The adjudicated cases seem to be harmonious in holding that where one is lawfully in the possession of an office, under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which such incumbent owes his election, or which by law is entitled to elect a successor."

See, also, *State ex rel. Chenoweth v. Acton*, 31 Mont. 37, 77 Pac. 299; *Koerner v. State*, 148 Ind. 158, 47 N. E. 323; *Magruder v. Swann*, 25 Md. 173; *State ex rel. Sheets v. Spiedel*, 62 Ohio St. 156, 56 N. E. 871; *Commonwealth v. Hanley*, 9 Pa. St. 513; *People v. Tilton*, 37 Cal. 614; *State ex rel. Wagner v. Compson*, 34 Ore. 25, 54 Pac. 349.

It is contended that the respondent is not eligible to hold the office of county treasurer at this time, since he has now been an incumbent of the office for more than two terms of two years each, and upon this contention appellant invokes the provision of § 7, art. 11 of the constitution of the state, which reads: "No county officer shall be eligible to hold his office for more than two terms in succession." But it seems

plain that the *Tallman* case has also disposed of this contention; since, under the holding of that case, the second term of respondent's incumbency as fixed by the statute has not yet expired; but in this connection it was contended upon the oral argument, that the legislature had no power to fix the term at more than two years, by reason of the provision of § 8, art. 6 of the constitution, which, among other things, provides: "All elections for such officers [county officers] shall be held biennially." This provision, however, must be read in connection with § 5, art. 11 of the constitution, which provides, relative to county officers, that the legislature "shall prescribe their duties and fix their term of office." It is possible that the legislature has not the power to fix the term of office of county officers so as to take away from the people the right to have biennial elections therefor, but subject to this right, it seems plain the legislature has power to fix the term and include in the term any contingent period dependent upon the failure of an elected officer to qualify; hence the legislature has not exceeded its power in fixing the term as provided by § 4224 above quoted. In the *Tallman* case above quoted from, this court in effect holds that the legislature had the power to fix the term, though it does not appear that this particular phase of the question was there being considered.

The view we have here taken of the questions involved is not only in harmony with what seems to us the plain language of the law fixing the term of office of county treasurers, but is also in keeping with the spirit of our constitution, which contemplates that all the principal officers of both the state and counties shall, as far as possible, be of the people's choice. County treasurers are specifically named among the officers which § 5, art. 11 of the constitution provides shall be elected. The people have the first and highest right to have officers of their own choosing; and no other method of placing incumbents in an elective public office, such as by appointment, can be tolerated under such a system without doing violence to

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the plain spirit of our constitution; save only in cases of vacancy, which cannot occur as long as one in the office, holding under election by the people, is eligible, duly qualified, and his successor has not been *elected and qualified* in the same manner. This view also finds support in the decisions of other courts. *State ex rel. Chenoweth v. Acton, Commonwealth v. Hanley*, and *Magruder v. Swann, supra*; *Rice v. Stevens*, 25 Kan. 302; *People v. Whitman*, 10 Cal. 38; *State ex rel. Carson v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. 663.

We are of the opinion that the term of office of the respondent had not expired when the county commissioners assumed to appoint his successor, and that there was no vacancy warranting such an appointment. The judgment of the superior court is therefore affirmed.

RUDKIN, C. J., CROW, and MOUNT, JJ., concur.

DUNBAR, J. (dissenting).—I dissent. I think the majority opinion is opposed to a proper construction of both the constitution and the statute.

ON REHEARING.

[*En Banc*. Decided October 30, 1909.]

PARKER, J.—After the decision in this cause was rendered by Department Two, the appellant filed a petition for rehearing before the court *en banc*, assigning as grounds therefor the following:

“First: Because under the terms and provisions of section 2, article 4, of the state constitution, this court is without right, power, or authority, to render or pronounce a decision unless a majority of the judges constituting the court join and concur therein, and therefore, the decision hereinbefore undertaken to be rendered on June 14, 1909, wherein only four out of nine judges joined and concurred, constitutes no binding or valid decision.

“Second: Because said decision so undertaken to be rendered and pronounced, as aforesaid, does not conform to, but is at variance with, the provisions of the constitution and

statutes of this state pertaining to the matters in controversy.”

The court being particularly desirous of having the question raised by the first ground assigned finally determined by the full court, argument was invited thereon before the court *en banc*, which was heard October 22, 1909.

As to the number of judges constituting a court and its division into separate departments, section 2 of article 4 of the state constitution, provides:

“The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision. . . . The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.”

The legislature, by chapter 24, pp. 33-37, Laws of 1909, increased the number of judges of the court from seven to nine and provided for separate departments, and also for the sitting of the court *en banc*. In so far as it relates to the powers of the court *en banc* and in departments, the act provides:

“Sec. 3. There shall be two departments of the Supreme Court, denominated respectively Department One and Department Two. The Chief Justice shall assign four of the associate judges to each department and such assignment may be changed by him from time to time: Provided, That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the Chief Justice. The Chief Justice may sit in either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court *en banc*. The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at Chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall

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be necessary to pronounce a decision in each department: Provided, That if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court *en banc*.

"Sec. 4. The Chief Justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is pronounced, order any cause pending before the court to be heard and determined by the court *en banc*. When a cause has been allotted to one of the departments and a decision pronounced therein, the Chief Justice, together with any two associate judges, may order such cause to be heard and decided by the court *en banc*. Any four judges may, either before or after decision by a department, order a cause to be heard *en banc*. . . ."

"Sec. 5. The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court *en banc*: Provided, That if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; . . ."

It is contended by learned counsel for appellant that while, by authority of this constitutional provision, the legislature may increase the number of judges and provide for separate departments of the court, a majority of all of the judges of the court are necessary to pronounce a decision in all cases, whether by a department or *en banc*, and that in so far as the act attempts to confer power upon a less number than a majority of the whole court to render a final decision, it is unconstitutional.

This contention is based upon the words in the first part of the constitutional provision: "A majority of whom shall be necessary to form a quorum and pronounce a decision." We think this provision has particular reference to the court as originally created, and before division into departments, and does not mean under all circumstances, regardless of the num-

ber of judges and departments, a majority of the whole court shall be necessary to pronounce a decision. To hold according to appellant's contention would render the latter part of the section relating to departments, the number of which are not limited, of little avail in accomplishing the purpose evidently intended. The evident purpose of the framers of the constitution was to enable the legislature to provide for an increase in the number of judges, and also an organization of the court into *separate departments*, to the end that the increase in litigation, which it was anticipated would occur with the future growth of the state, could be properly cared for. Now, when the court is divided into separate departments, it is manifest that there cannot be a majority of all the judges in each department at the same time. Hence, if the contention that a majority of all the judges are necessary to a decision be upheld, there would be at least one department without power to pronounce a decision even by its unanimous vote. We think it was contemplated that separate departments might be provided for, each with full power to hear causes and pronounce decisions independent of the other, and at the same time.

It is argued that since there is no limit to the number of departments the legislature may provide for, it might go to the extent of providing for departments consisting of even less than three judges, and thus result in decisions being rendered by a less number than a majority of the court as originally created, if we should hold that less than a majority of the whole can pronounce a decision. The terms of this act are not such that we are called upon to determine such a question at this time. There may be sound reason for contending that under no circumstances can less than three judges pronounce a decision, in view of the words in the constitution: "The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision." If this be the spirit of the constitution, then this act providing for departments and defining

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their powers is clearly within that spirit, for by its terms, "The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at Chambers," and "A concurrence of three judges shall be necessary to pronounce a decision in each department." So that a litigant is in as favorable position, as to the least number of judges to whom he can be compelled to submit his cause, and also as to the least number of judges who can pronounce a decision thereon, as he was when the court existed under the constitution before an increase in its membership and its division into departments by the legislature. We are of the opinion that the provisions of the act providing for separate departments of the court and defining the powers of the departments acting separately is not unconstitutional, and that a litigant is not entitled to a hearing before the court *en banc* as a matter of right because judgment may have been pronounced in his case by the concurrence of a less number of judges than a majority of the whole court.

Notwithstanding our views upon the question raised by the first ground in the petition for rehearing, we have heard argument sitting *en banc* upon the merits, and adopt the views of Department Two as expressed in their decision of June 14, 1909, and the judgment of the superior court is therefore affirmed.

RUDKIN, C. J., CROW, MOUNT, and MORRIS, JJ., concur.

DUNBAR, J. (dissenting)—I concur in the constitutional question discussed, but dissent to the opinion expressed on the merits.

FULLERTON, J., concurs with DUNBAR, J.

[No. 8050. Department Two. June 14, 1909.]

HENRY BOCK, *Appellant*, v. IVER SORENSON *et al.*,
Respondents.¹

APPEAL—REVIEW—FINDINGS. In an action to foreclose a lien, findings on absolutely conflicting testimony, supported by sufficient evidence, will not be disturbed on appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 3, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

Harris Baldwin, for appellant.

Swanson & Ripley, for respondents.

DUNBAR, J.—The plaintiff and the defendants entered into an oral contract, by which the plaintiff was to dig a well for the defendants. This action is brought by the plaintiff to foreclose a lien for digging the well, for ninety-four feet alleged to have been dug by the appellant, at \$3 a foot, which was the contract price. The complaint set forth this state of facts substantially, alleging refusal and failure to pay on the part of the defendants. The defendants answered, denying the allegations of the complaint, and alleging affirmatively that the contract was that the plaintiff should dig for the defendants a first-class well, containing such a quantity of water as would fully supply all needs for watering stock and water for farming purposes, and should contain such quantity of water that the same could be conveyed to the surface by means of windmills or gasoline engine, the plaintiff expressly promising and agreeing to get all the water for the defendants that they needed; that in consideration of such representations, the defendants agreed to pay plaintiff the sum of \$3 per foot; that it was especially agreed that plain-

¹Reported in 102 Pac. 428.

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tiff should not cease working at said well until said defendants were satisfied that he had sufficient water; that plaintiff commenced boring said well, but failed to comply with his contract, and failed to go down to a sufficient depth to obtain the water contracted for, when he ceased boring the well against the protest of the defendants, and quit and abandoned the boring of the well without having complied with his contract; the defendants alleging that the well as it was left by the plaintiff was of no benefit to them whatever, but affirming that they were ready at any time to pay plaintiff at the rate of \$3 per foot whenever he complied with the agreement.

The case was tried by the court, who found that plaintiff had failed to comply with his contract; that he had abandoned said contract without having complied with the same; that he abandoned the said contract against the will and desire of defendants; that he had failed to go down to a sufficient depth to procure a good and sufficient amount of water, and wholly and totally failed to comply with the said contract, all of his own fault and not of the fault of the defendants; that the evidence introduced failed to sustain the allegations of plaintiff's complaint, and that the allegations were not true; found that the plaintiff and defendants entered into a contract wherein and whereby plaintiff was to drill a first-class well on the defendants' premises for the agreed sum of \$3 per foot. As a conclusion of law, the court found that the plaintiff was not entitled to foreclose his lien, or to recover any sum whatever from the defendants; and judgment of dismissal was entered, from which this appeal is taken.

The appellant alleges error based on the findings of fact. It is contended that the testimony does not show that the appellant and respondents made a contract whereby the appellant agreed to drill a first-class well for the respondents, or that the appellant failed to comply with his contract. The testimony in this case is brief, but it is absolutely conflicting on the two main propositions, viz., whether the contract was for a completed and efficient well, or whether the appellant,

under the terms of the contract, was entitled to recover the stipulated price per foot regardless of whether the well was completed; and was equally conflicting on the other proposition as to what the test showed in regard to the amount of water which had been obtained at the time the appellant ceased to work and removed his plant from the respondents' premises. If the court believed the testimony of respondents in this case, it was fully justified in making the findings which it did make, and from an examination of such testimony we do not feel justified in disturbing the findings made. The judgment is therefore affirmed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8107. Department Two. June 14, 1909.]

SAMUEL ADAMS, *Appellant*, v. M. A. WINGARD *et al.*,
Respondents.¹

FRAUDULENT CONVEYANCE—HUSBAND TO WIFE—EVIDENCE OF GOOD FAITH—BURDEN OF PROOF. Under Bal. Code, § 4580, casting the burden of proof upon one asserting good faith in transactions between husband and wife, a deed from the husband to a wife in consideration of love and affection is not shown to have been made in good faith, where it was made on the same day that suit was brought against the husband, and before judgment the husband and wife joined in a deed of other property which was admittedly a fraud upon creditors; and a mere assertion by the wife that there was no collusion is not sufficient under the circumstances.

SAME—RETURN OF NULLA BONA—SOLVENCY OF GRANTOR—BURDEN OF PROOF. Where a creditor made at different times two conveyances in fraud of creditors, a return of an execution *nulla bona* is *prima facie* evidence that there was no other property out of which to satisfy the debt, subjecting both conveyances to attack; and the burden is upon the defendants to show affirmatively that the second conveyance, which was set aside, was sufficient to satisfy the debt, in order to sustain the first conveyance on the theory of solvency at that time.

¹Reported in 102 Pac. 426.

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Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered July 2, 1908, upon findings favorable to the defendants, after a trial on the merits before the court without a jury, in an action to set aside conveyances of real property. Reversed.

A. H. Garretson and J. W. A. Nichols, for appellant.

Harry H. Johnston, for respondents.

DUNBAR, J.—A judgment was obtained by the plaintiff against defendant L. J. Wingard, who it was alleged had alienated the affections of the wife of the appellant and afterwards married her. The judgment was for \$750. On the date of the commencement of said action, to wit, the 3d day of February, 1906, L. J. Wingard deeded to his then wife, M. A. Wingard, formerly the wife of the plaintiff in this case, a certain tract of land in King county. A judgment in that action was obtained October 26, 1906, and on October 4, 1906, Wingard and wife conveyed to defendant H. H. Brown certain property in Pierce county. This action was commenced October 25, 1907, to set aside both said conveyances as having been made in fraud of plaintiff, and to have said property subjected to plaintiff's judgment for damages. The defendant L. J. Wingard defaulted. The other defendants, M. A. Wingard, the wife, and H. H. Brown, answered, admitting the transfer of the King county property to the wife and that the only consideration was the alleged natural love and affection, and admitting the fraudulent transfer of the Pierce county property to said Brown; and joined with plaintiff in alleging said transfer to be without consideration and void, and asking that it be cancelled. At the close of the trial, the court ruled that the conveyance to Brown was fraudulent and that the same be set aside, but refused to set aside the transfer of the King county property to the wife. Judgment was entered in accordance with said ruling, and from said judgment, this appeal is taken.

As we have indicated, the defendant Wingard did not appear in this action, nor did he testify in the case. The only testimony on the subject of the transfer was that of the wife, M. A. Wingard, who testified that the consideration was love and affection, and that there was no collusion in the transaction. Conceding, without deciding, that love and affection are a sufficient consideration for the transfer of real estate as against existing creditors, our statute provides, Pierce's Code, § 3864 (Bal. Code, § 4580), that in every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith. This burden of proof in this case, in our opinion, was not met by the respondents.

The mere assertion on the part of the wife that there was no collusion is not sufficient, especially when viewed in connection with all the circumstances of the case. The deed was made out upon the same day that the husband was called to account for alienating the affections of the appellant's wife, which is of itself a suspicious circumstance. In addition to this, just a few days prior to the entry of the judgment against him, the defendant fraudulently conveyed the other tract of land in controversy to one Brown, and his wife joined him in the conveyance. This conveyance is admitted, both by Brown and by the respondent M. A. Wingard, to be fraudulent, Brown testifying that he knew nothing of the transaction whatever, and disclaiming any interest in the property, and Mrs. Wingard testifying to what seems to us to be an improbable story,—that while she admitted that she signed the deed to Brown, she did not know that it was a deed; that her husband had told her that there were some papers for her to sign, and that she had signed them believing them to be subpœnas in the case. She testifies that one Mrs. Remster was in company with her at the time when she signed those papers. She does not pretend to explain how she came to be

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signing subpoenas for witnesses in that case, or why Mrs. Remster should be signing subpoenas for witnesses with her, and she testifies that Mrs. Remster did sign the same papers that she did, the deed itself showing that Mrs. Remster had signed as a witness and that Mr. and Mrs. Wingard had signed the deed as parties of the first part, the acknowledgment of said deed having been properly taken by a notary public. These transactions, to our mind, do not place the respondents in this case in a very good light, but tend rather to strengthen the presumption that the conveyances were fraudulent, than to relieve them of that legal presumption.

But it is claimed that, under the law and the decisions of this court, the appellant could not recover in this case because it was not shown that there was no other property out of which his judgment could be satisfied. It is undoubtedly a well-established rule that a judgment creditor has no interest in any particular property of the debtor, and that all that he can ask is that there be sufficient property available to him for the purpose of satisfying his judgment. But in this case there was an execution issued and placed in the hands of the sheriff of King county, and a return of *nulla bona*. This return was *prima facie* evidence that there was no property out of which the judgment could be made. There was also other testimony tending to support the return of the officer, the attorney for the appellant testifying that he had searched the records and had made diligent inquiry, and was unable at any time to find any property in the name of the defendant or which was claimed by him.

It is true that, at the time of the trial of this case, there was an attempt to show that there was property in Pierce county which was subject to execution at the time the deed to Mrs. Wingard was executed by her husband. Conceding this to be true, these conveyances were fraudulent as we have seen, and the execution creditor had a right to attack either or both of them in aid of his judgment, and it is not within the power of the respondents to choose for him the particular

property upon which he shall levy. It might be that, if it had been shown in the trial of this cause that the Pierce county property was ample to satisfy the judgment, the judgment in this case would not be disturbed, for there would be no necessity for such action. But as the case now stands, the fact urged by the respondents that the value of the Pierce county property was not shown, is a fact which militates against them instead of the appellant, for it was incumbent upon them to show affirmatively that appellant's judgment could be satisfied out of the Pierce county property.

The judgment will therefore be reversed, with instructions to enter a judgment in accordance with the prayer of the complaint.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 7592. Decided June 15, 1909.]

EMMA JOHNSON *et al.*, *Appellants*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT ASSESSMENTS—REASSESSMENTS—EFFECT OF JUDGMENTS. A judgment holding an assessment for a local improvement valid as to certain tracts and invalid as to other tracts, does not prevent a reassessment of the whole district.

SAME—ADDITIONAL COSTS AND INTEREST. Upon a reassessment for local improvements, the city may include additional costs and accrued interest.

SAME—JUDGMENTS—RES JUDICATA. Judgments in actions declaring the validity or invalidity of local improvement assessments are not *res judicata* in another action upon a reassessment.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 10, 1908, after a hearing upon stipulated facts, affirming a reassessment upon property for a local improvement. Affirmed.

¹Reported in 102 Pac. 448.

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C. M. Miller, for appellants.

Scott Calhoun, King Dykeman, and Howard A. Hanson,
for respondent.

MOUNT, J.—This appeal is from an order of the lower court affirming a reassessment made by the city council upon property benefited within a local improvement district in the city of Seattle. The facts are stipulated. It appears therefrom that, in 1904, the city of Seattle, by ordinance, provided for the paving of Harvard avenue and Harvard avenue north. The property benefited was designated as Improvement District No. 902. The streets were paved as provided, and an assessment roll was prepared by the city engineer, who assessed the lots benefited back to one hundred and twenty feet from the streets. This roll was referred by the city council to a committee for adjustment and equalization. This committee recommended that lots in blocks three hundred and sixty feet deep should be assessed to the center of the block, or one hundred and eighty feet, instead of one hundred and twenty feet deep as the roll was originally prepared, and the committee carried out the changes in red ink in the column marked "Changes ordered by the council." These recommendations were adopted by the council. The assessment roll was then referred back to the engineer to make the changes agreed upon. The original amounts charged against each parcel of property were entered in the roll in black ink figures, while the changes "ordered by the council" were entered in another column in red ink figures. The aggregate of these two columns was the same. In many instances the black ink figures were reduced by the red, and *vice versa*, so that in the aggregate the columns were equal. An ordinance was thereupon passed approving the assessment roll. This ordinance was numbered 11,343, and provided,

"That there be and is hereby assessed and charged against each parcel and lot of land and part thereof contained in said

local improvement district, as shown in said roll, the respective amounts therein set against each parcel and lot of land and part thereof, which said assessments shall be levied and collected in ten equal annual installments . . . the whole amount hereby assessed and charged against the property in said local improvement district being the sum of \$135,131.91."

The rate of assessment was stated by the front foot for subdivisions of each lot, and that rate was carried into the assessment roll. Certain appeals were taken from the order of the council to the superior court of King county, but the roll was confirmed by that court. Thereafter the roll was certified to the city treasurer for collection. This officer maintained that the red ink figures were approved by the ordinance, while some of the taxpayers whose assessments were lowered by the black ink figures, insisted that the ordinance approved the black ink figures and refused to pay the amount shown by the red ink figures. Large amounts were collected upon the basis of the red ink figures. Thereafter bonds as provided by the ordinance were issued for the unpaid portion of the assessments, and these bonds were tendered to the contractor who had made the improvement. This contractor, viz., the Barber Asphalt Paving Company, refused to accept the bonds, and brought an action in mandamus to compel the city to make a reassessment of the property. That action was prosecuted to this court (*State ex rel. Barber Asphalt Paving Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11), and this court held that the assessment of the sixty-foot strip was void for want of notice to the property owners, but that the assessment was valid for the strip one hundred and twenty feet deep. The case was remanded with instructions to reassess the sixty-foot strip for the amount apportioned thereto, viz., \$2,222.29, and accrued interest.

In the meantime one Frances E. Lester, a property owner, brought an action to require the city treasurer to accept full payment of her assessment based on the black ink figures in the assessment roll. Her property was a narrow strip with-

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in the one hundred and twenty-foot limit. The black ink figures charged her parcel the sum of \$2.34, while the red ink figures showed her assessment to be \$76.23. The lower court sustained her contention that the one hundred and twenty-foot strip was shown by the black ink figures and was a valid assessment, and ordered the city treasurer to receive the \$2.34 and cancel the assessment. Several other parties brought similar actions, with the same result. The city appealed to this court from the judgment in the *Lester v. Seattle* case, and we reversed the judgment of the lower court (42 Wash. 539, 85 Pac. 14), and said:

"The judgment entered by the trial court, however, not only cancelled the void assessment on the respondent's property and enjoined its collection, but it enjoined the city from 'collecting or attempting to collect any further amount on account of said improvement.' Since the city has the right to reassess the respondent's property for its due proportion of the cost of the improvement remaining unprovided for, that part of the judgment quoted is plainly erroneous, and the city should not be embarrassed by it in its effort to make a reassessment."

Thereafter the city passed an ordinance providing for a reassessment of all the property in the improvement district No. 902, and in pursuance of that ordinance a new assessment roll was prepared, and all of the property was included therein, both within the one hundred and twenty-foot limit and without that limit, sixty feet where blocks were three hundred and sixty feet deep. This roll was identical with the original roll as amended by the city council by the red ink figures hereinbefore mentioned. A day was set for hearing upon this reassessment roll and, after objections were overruled, an ordinance was passed approving the reassessment roll and levying an assessment on the property benefited according to this roll. This ordinance provided for credit to those who had previously paid, and also provided for interest upon assessments not paid upon the first assessment. An appeal was taken to the superior court, and the

reassessment was there affirmed and approved. This appeal is prosecuted from that judgment.

Appellants argue that the first assessment was a valid assessment as to the one hundred and twenty-foot strip, because it had been so held by this court in the *Barber Asphalt* case above mentioned, and therefore that the city had no authority to reassess, and that the reassessment is invalid because it provides for interest from the date of the original assessment; that the judgments above referred to are *res adjudicata* as to the rights of the parties who paid assessments as provided in those judgments.

All the difficulties in this case arise from the apparent conflict of the decisions of this court in the two cases above mentioned, viz., *State ex rel. Barber Asphalt Paving Co. v. Seattle*, and *Lester v. Seattle*, *supra*. In the first of these cases we held that the assessment as to the one hundred and twenty-foot strip was a valid assessment, and refused to avoid the whole assessment, but directed a reassessment of the sixty-foot strip outside of the one hundred and twenty-foot strip. A few days later, in the other case, which involved the same assessment and where a party who owned property within the one hundred and twenty-foot strip sought to compel the city to receive an assessment according to the original roll, and also obtained an order enjoining the city from collecting "any further amount on account of such assessment," we said:

"Since the city has the right to reassess the respondent's property for its due proportion of the cost of the improvement remaining unprovided for, that part of the judgment quoted is plainly erroneous, and the city should not be embarrassed by it in its effort to make a reassessment."

This statement clearly indicates that the city was authorized to reassess the property within the one hundred and twenty-foot limit to pay for the cost of the improvement. In the former case we held that the assessment of the one hundred and twenty-foot strip was valid; that it was only neces-

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sary to reassess the sixty-foot strip. The authority of the city to reassess the whole improvement district was incidentally involved in the *Barber Asphalt Paving Co.* case, and upon that question we said:

"It [the city] contends, first, that the city exhausted its powers when it made the original assessment, and cannot now make a reassessment except by virtue of the act of 1893; and under that statute it cannot make a reassessment until the first assessment has been declared void by the judgment of a court, and here there has been no such judgment. But the city has power, by its charter and the general statutes and ordinances under which it originally proceeded, to make a valid assessment of property benefited to pay for a street improvement, and this power is not exhausted by any irregular, voidable, or void attempt at its exercise. In other words, its power to make a valid assessment does not depend on the statute of 1893. It has that power from the laws granting the power to make assessment, and no number of voidable or void attempts at its exercise destroys the power. True, the statute of 1893 is the only one operative in a certain class of cases; for example, where lapse of time or fundamental defects in the original law prevent a valid assessment under such original law, but it was not intended to cut off, and does not cut off, the right of a city to make a valid assessment where no other objection intervenes save the one that the city has already made an invalid or voidable attempt at an assessment."

This statement indicates that the city has authority to reassess the whole improvement district to pay for benefits to the property improved, and when considered in connection with what was said later in the other case, makes it clear that the city had such authority notwithstanding we had held a part of the assessment valid. The city also clearly had a right to include within the assessment additional costs and interest accrued. *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742.

The cases brought under the old assessment above referred to are not *res adjudicata*, for the reason that the old assessment is superseded by the reassessment. Those cases

had reference to the old assessment, and were *res adjudicata* as to the questions raised therein; but they are not so as to the reassessment, further than a payment under the old assessment becomes by the ordinance a payment *pro tanto* under the reassessment. The assessment is identical with the red figures in the old assessment, and appears to be a fair assessment for benefits received by the property in the district. It is not claimed that the property improved has not received benefits to the amount of the reassessment.

The judgment of the lower court affirming the reassessment is therefore affirmed.

ALL CONCUR.

[No. 7792. Decided June 15, 1909.]

RICHARD H. RAINES, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY *et al.*, *Appellants*.¹

MASTER AND SERVANT—RAILROADS—NEGLIGENCE—CONSTRUCTION OF SIDE TRACKS. It is not negligence rendering a railroad company liable to its locomotive fireman, struck by a passing train while cleaning out his engine on a side track, that the side tracks were constructed so near the main line that plaintiff was struck while so engaged, if the tracks are far enough apart to permit trains to pass in safety.

SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. An experienced locomotive fireman, familiar with the locality, who was struck by a passing train on the main line, while he was cleaning out his engine on a side track, is guilty of contributory negligence, as a matter of law, notwithstanding he had received no notice of meeting a train, where, before commencing work, he could have seen the train on the main line had he looked, but went to work in a cloud of steam where he was prevented from seeing or hearing the approaching train, and so close to the main line that he knew he would be struck by any passing engine.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 23, 1908, upon the

¹Reported in 102 Pac. 431.

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verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a locomotive fireman by being struck by a passing train. Reversed.

L. C. Gilman, B. O. Graham, and Frederic G. Dorety, for appellants.

Elias A. Wright, John B. Hart, and Robert H. Evans, for respondent.

MOUNT, J.—Action for personal injuries. Plaintiff recovered a judgment in the court below. Defendants appeal.

The facts are in substance as follows: Respondent was employed by the Great Northern Railway Company as a locomotive fireman, on freight engines running between Leavenworth, on the east side of the Cascade mountains, and Delta, a station on the west side. Respondent had been engaged in this work about five months, and had been over the road many times. On the evening of November 16, 1907, the respondent was directed to go on engine No. 1801, for a run from Leavenworth to Skykomish and return. He left Leavenworth at ten o'clock in the evening to assist the train over the mountains. His engine at this time was leaking steam around the cylinders. It was one of the largest engines used by the railroad company, and was built for heavy freight work. It had a large fire box. Respondent arrived at Skykomish about daybreak on November 17. He left his engine at the sand house. At about eight o'clock of the same evening he was called for a return trip, and left east for Leavenworth with a train of freight cars. His engine was assisted by a helper engine, and arrived at the Wellington switch at about 6:30 the following morning. It was daylight at that time. As the train came to the station of Wellington, it went on a siding or passing track in order to clear the main line. This station is near the west portal of the Cascade tunnel, which is about three miles in length. It is customary and necessary for the firemen on all eastbound trains to clean their fires at this point in order to get up a good head of

steam before passing into the tunnel. This work was done on the siding on which respondent's train entered, and the engineer would not proceed until the work was done. In order to clean the fires, it was necessary for the fireman to go upon the ground beside his engine and poke the ashes down from that side with a small hoe which was furnished by the company for that purpose. Then he would cross the engine, or go around it, and do the same on the other side.

As soon as respondent's engine No. 1801 went on the siding at Wellington, the helper engine was taken off and proceeded to the coal chute on the opposite side of the main line. Respondent then began to clean the grates of his engine. He first cleaned the right side, and then climbed through the cab to the left side where the main line of the railroad was located. Before commencing his work on the left side of the engine, he walked out beyond the escaping steam and looked to see where the helper engine had gone. At that time an extra freight going west was standing on the main line a short distance beyond the depot. The main track made a curve to the right from the point where respondent's engine stood, to and beyond the depot, so that respondent did not see the extra train headed west standing on the main line. Respondent could have seen it, however, if he had stood back far enough to see around his engine. Respondent had received no notice that another train was to meet them at that point. It was the custom of the railroad company to notify train crews of meeting points for the passing of extra trains. The respondent, thereupon, began to clean the ash pan on the left side of his engine. He could not see ahead on account of the escaping steam. He did not hear the whistles of the approaching train by reason of the rattle of his hoe upon the grates and the noise of the escaping steam. As he was stooping over at his work, the engine of the extra train west struck him upon the back, knocked him down, and injured him.

The distance between the side track and the main line was six feet ten inches, the engine at which respondent was

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working projected over the rail two feet eight inches, and the engine of the extra train west projected over the rail one foot ten inches, leaving about two feet four inches in the clear between the passing engines. The evidence shows that some of the side tracks were located as much as fifteen feet from the center of the main line to the center of the side track. The side track where the accident happened was located twelve feet from the center thereof to the center of the main line. This was the minimum distance at which side tracks were constructed on the line of the Great Northern railway. The negligence alleged was, that the main track and passing track were too close together, and that the engine furnished to the respondent leaked steam so as to obstruct his view and prevent his hearing an approaching train.

Several questions are presented in the case, but respondent was so clearly guilty of contributory negligence that we shall not consider other questions. It is perfectly clear that the passing track was far enough away from the main line to permit trains to pass in safety, and this was the object to be attained in constructing the siding. The manner of constructing the tracks was therefore not negligence of the company. *Tuttle v. Detroit etc. R. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114.

While the respondent testified that he was not familiar with the distance between the main and side tracks, he knew of course that the distance was safe enough for the passing of trains for which it was constructed; and while he also testified that no train had before passed along there while he was in the act of cleaning his ash pan, he must have known that he could not stand beside the main line closer than two feet without danger from a passing train. He was perfectly familiar with engines; knew the distance different types overhung the rail, and he must have known that the space between two trains passing at this point would not permit him to stand back from his engine or in a stooping

posture closer than two feet from the passing train. He also testified that he did not know the extra west was at the Wellington depot; that it was the rule and custom of the company to give train crews passing orders; that such orders were communicated to him, and that no such notice was given to him upon this occasion.

The extra west was at the depot, or a little east from it, when respondent's train went upon the siding. If respondent did not know that fact, it was because he did not look. The train was in plain view all the time he was there, except when he was on the ground or in the steam of his own engine. Respondent's engine was standing on a passing track so as to leave the main line clear in order that trains might go by. The object of a meeting notice was to prevent collisions, and to permit trains to go upon passing or side tracks. There was, therefore, no necessity for a meeting notice or order to be given to the crew at that point. The respondent, knowing that his engine was upon a passing track so as to leave the main line clear for other trains, and without looking for the train which was about to pass upon the main line, went into a cloud of steam which prevented him from seeing the approaching train, and while the escaping steam from his own engine together with the noise he was making with his hoe on the grating prevented him from hearing the signals of the approaching train, he stood so close to the main line that he was struck by the passing engine and was injured.

When these facts are considered, in connection with the fact that the respondent was an experienced fireman and had been over this line almost daily for a period of five months, we see no escape from the conclusion that the respondent's own negligence contributed to his injury, and was in fact the direct cause of it. It is no answer to say that respondent's duty required him to clean the ash pan at this particular point, and that the appellant failed to furnish respondent with a reasonably safe place in which to perform that

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work. The place was reasonably safe when trains were not passing on the main line. It is not shown that respondent was required to work there when a train was passing, and of course he was not required to do so. Trains were liable to pass at any time, and respondent, like other employees working on or near the main line, was naturally required to keep out of the way and not blindly and carelessly put himself in the way of a passing train.

In the case of *Baker v. Tacoma Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826, where Mr. Baker was attempting to cross a street, and while seeking to avoid trains in front of him was run down by a train coming up behind him, we held that he was guilty of contributory negligence as a matter of law, because he did not look and listen for trains in his rear. And in the case of *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 88 Pac. 1058, where an experienced brakeman, knowing that an engine was upon the track in the railway yards, and relying upon the custom to ring the bell before moving an engine, walked upon a track in a cloud of steam without stopping to look or listen and was struck and injured without warning, we held he was guilty of contributory negligence which would prevent a recovery. In the latter case we said:

"He also testified that he did not look to see if the engine was coming, because the steam was following him and around him to such an extent that he could not have seen if he had looked; that as a rule at that time the engines around the yard were blowing off more or less steam. It seems to us that a man of experience who would place himself in the position that the appellant did, under the circumstances which he describes, cannot claim that he was exercising any degree of prudence or care whatever; but that, on the other hand, he was guilty of a high degree of negligence."

This language is applicable to this case with as much force as it was to that case. The two cases are parallel in principle. In the *Anson* case a warning, if given, might have prevented the injury. In this case, warnings were given by blowing whistles, but the respondent placed himself in such

a position that he could not see nor be seen by persons in charge of the approaching train, and could not hear the warning signals. He also placed himself on or near the main track of the approaching train without taking any precautions whatever for his own safety. Common prudence would require that he make sure that a train was not approaching, or that he keep himself clear of the main line, or that he request his engineer, who was sitting in the cab of the engine at the time, to notify him of approaching danger. He neglected to do any of the things which it seems a reasonably prudent man would have done. We think, therefore, that the trial court should have sustained appellants' motion for a directed verdict on this ground.

The judgment is reversed, and the cause remanded with instructions to dismiss the case.

RUDKIN, C. J., CROW, CHADWICK, DUNBAR, GOSE, and FULLERTON, JJ., concur.

PARKER and MORRIS, JJ., took no part.

[No. 7819. Decided June 15, 1909.]

J. CONRAD CASH, *Respondent*, v. ALLEN MEISENHEIMER,
Appellant.¹

VENDOR AND PURCHASER—BREACH—DAMAGES—REMEDIES OF VENDEE—DEFENSES. A vendee cannot recover damages for breach of a contract to convey land, induced by false representations of the vendor that he was a single man, where the vendee was in default in his payments, and the vendor gave notice of forfeiture under the terms of the contract, there being no evidence that the vendor's wife refused to join in a deed or claimed any interest in the property.

SAME—RESCISSION BY VENDEE—DEFECTS IN TITLE. The fact that the vendor did not have the legal title to land, which was held for him by a trustee, does not entitle the vendee to rescind, while in default on payments, where the vendee knew the state of the title at the time of the sale.

¹Reported in 102 Pac. 429.

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SAME—CONTRACT—FORFEITURE—WAIVER—EXTENSION OF TIME. Extending the time for and accepting payment, after defaulting on certain installments due on a land contract, does not waive the right to declare a forfeiture for default in paying future installments, time for which was not extended.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered October 2, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages for breach of contract. Reversed.

Merritt, Oswald & Merritt, for appellant.

W. E. Southard, for respondent.

MOUNT, J.—Plaintiff brought this action to recover damages for an alleged breach of contract of sale of real estate. He recovered a judgment in the court below. Defendant appeals.

The amended complaint alleges, in substance, that the defendant, in 1902, falsely represented that he was a single man and the owner in fee of section 5, township 20, north, range 30, in Douglas county, and thereby induced plaintiff to enter into a contract in writing for the purchase of said land at the agreed price of \$6,440; that certain payments were made on the contract, plaintiff went into possession of the land, and made improvements thereon; that thereafter plaintiff notified defendant of his readiness to pay the balance due, and demanded an abstract of title and a deed to the premises; that defendant furnished an abstract of title which showed that he was a married man, and tendered a deed executed by himself; that defendant refused to deliver a deed executed by his wife, who claimed an interest in the property and refused to join in such deed; that thereafter the defendant wrongfully declared the contract forfeited.

Defendant demurred to the amended complaint. This demurrer was overruled, and defendant answered and admitted

the making of the contract, the payment of \$1,000, and that plaintiff went into possession of the premises and made improvements thereon of the value of \$600; but denied all the other allegations of the complaint; and by way of affirmative defense alleged, that the written contract attached to the complaint was entered into; that plaintiff paid the defendant \$1,000; that the property described in the contract was the separate property of the defendant; that plaintiff went into possession of the premises and farmed the same for the years 1903-4-5-6, and retained the proceeds thereof; that plaintiff did not make the deferred payments when due, but subsequently thereto defendant agreed that plaintiff might sell one quarter of the land for \$2,560, provided the whole thereof was applied upon the contract; that this was done, and thereafter no further payments were made; that in 1906 the plaintiff informed defendant that he could not make the payments agreed upon in the contract, and would reconvey said real estate to the defendant; that thereafter in 1907, plaintiff abandoned the land, and subsequently, in April of 1907, defendant served upon plaintiff a written notice of forfeiture of the contract because of failure to make the payments, and thereafter took possession of the land. The reply of the plaintiff denied the affirmative matter. The case was tried to the court without a jury, and findings were made and a judgment entered in favor of the plaintiff for \$6,761.48.

Appellant argues that the amended complaint fails to state a cause of action. In view of the fact that the case was tried upon its merits, and in view of our conclusion that the complaint is not sustained by the evidence in essential particulars, we need not discuss the allegations contained in the complaint. The basis of recovery in the action is that the respondent himself was not in default, and that the appellant was in default. The complaint alleged facts showing such basis. But the evidence of the respondent showed conclusively that he

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was in default at the time of the forfeiture. The contract provided for payments as follows:

“\$1,000 cash, the receipt of which is hereby acknowledged, and the remainder, \$5,440, to be paid in seven payments as follows, to wit: \$777 on or before Nov. 1st, 1904; \$777 on or before Nov. 1st, 1905; \$777 on or before Nov. 1st, 1906; \$777 on or before Nov. 1st, 1907; \$777 on or before Nov. 1st, 1908; \$777 on or before Nov. 1st, 1909; \$778 on or before Nov. 1st, 1910. With interest on all the said amounts at the rate of eight per cent per annum from date until paid, payable annually November 1st, of each year.”

In December of 1904, after the installment for that year was past due, appellant agreed that respondent might sell one quarter of the land at \$16 per acre, provided the whole amount received on the sale would be applied on the indebtedness. The sale was made and the proceeds of the sale were applied upon the contract. This paid the 1904 installment together with the interest due, and, also, all but \$177.77 on the 1905 installment.

Thereafter in 1906, while the balance on the 1905 installment and all of the 1906 installment were past due and in default, respondent requested permission of appellant to sell or mortgage the south half of the section. Appellant consented to the sale, provided the whole amount realized should be applied on the contract. This was agreed to by the respondent. Respondent attempted to sell the land, and found a purchaser who was willing to take it at the price of \$5,100, within a limited time. Respondent informed appellant of the offer, but did not mention the time limit. Appellant then procured an abstract as requested by the respondent, and executed a deed, but when the abstract and deed were tendered to the purchaser, he refused to complete the purchase of the land because the time limit had expired. Thereafter the respondent made no further effort to comply with his contract, and made no other payments, but leased the land and moved away from it. The appellant in April, 1907,

while respondent was in default, served a notice of forfeiture, and retook possession of the land. This evidence shows clearly that the respondent himself was in default, and had neither performed nor offered to perform the conditions of his contract.

The complaint also alleged that the appellant did not have, and could not convey, good title. The proof shows upon this subject that appellant and Edna Meisenheimer were husband and wife; that they were married on November 17, 1899, and divorced on December 27, 1904. She testified at the trial that she was still the appellant's wife, but gave no other evidence. Assuming that she and the appellant were husband and wife at the time of the trial, and assuming also that she had a community interest in the land, both of which assumptions are at least doubtful, there is no evidence that she had refused to join in a deed, or that she had not fully ratified the contract for the sale of the land. There is no evidence that she even claimed an interest in the land at that time.

The proof also showed that at the date of the contract between respondent and appellant, viz., December 22, 1902, the legal title of the land stood in the Northern Pacific Railway Company; that appellant and others had entered into a contract with the Northern Pacific Railway Company for the purchase of the land; that this contract was made in the name of one C. F. Clodius. The respondent, at the time he entered into the contract with the appellant, was fully informed of these facts. In 1904, a deed of the land, together with other lands, was executed by the railway company to C. F. Clodius, one of the original purchasers from the railway company. Mr. Clodius held the land in trust for the real owners, of whom defendant was one. Thereafter, in January, 1905, Mr. Clodius and wife, for a nominal consideration of \$5, conveyed the land in dispute, together with other lands, in all amounting to two thousand four hundred acres, to

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Maud Motley, and the legal title, so far as the proofs show, now stands in her name.

It is not shown what relation Maud Motley bears to the appellant, except by inference, and there is no proof, other than this mere transfer, that Maud Motley claimed to be an innocent purchaser or the owner of the property by virtue of the deed from Clodius, or that she refused to convey the land in dispute to the respondent, or that the appellant did not have complete control over the land. It is conceded that Clodius held the land in question as trustee for the appellant. The presumption from the mere transfer by Clodius and wife to Maud Motley for a nominal consideration, under the circumstances shown in this case, in the absence of any further showing, must be that the grantee took only the interest of Clodius and wife. If the appellant, after the date of the contract, had put it out of his power to convey a good title to the respondent, in that event the respondent might rely upon that fact for a rescission, and would then not be required to offer to perform. But the respondent having shown that he had not offered to perform his part of the contract, then it devolved upon him to show that appellant had put the title where he could not perform the contract. The evidence fails to show that fact. The appellant did not have the legal title when the contract was entered into, and respondent was fully informed concerning the condition of the title. The contract provides:

"It is especially agreed that time is of the essence of this contract, and in case of default by the party of the second part (plaintiff) his heirs and assigns, in any of the conditions above stipulated to be performed by him, then and in that case this contract shall become void, and the party of the second part shall have forfeited his rights hereunder, and any payments that shall have been made shall become forfeited to the party of the first part, which said payments it is hereby especially agreed shall in that case be deemed as damages hereby liquidated for non-performance of the contract of said second party."

It is argued by respondent that, because a payment was made after the time provided therefor, and because appellant agreed to accept the final payment after a default had been made, therefore this forfeiture clause was waived. It no doubt was waived as to payments then made and accepted. But a previous waiver did not necessarily waive subsequent payments accruing thereafter by the terms of the contract. *Phelps v. Illinois Central R. Co.*, 63 Ill. 468; *Reynolds v. B. & M. R. Co.*, 11 Neb. 186, 7 N. W. 737; *Lent v. B. & M. R. Co.*, 11 Neb. 201, 8 N. W. 431. In the last-named case it was said:

"No one would contend, of course, that, as to the installments received, there was not a waiver; but the argument of counsel goes further, and amounts to this: that the acceptance of payments overdue is a waiver of the matter of time, not only as to them, but also as to those falling due thereafter. Such, however, is not the law. The proposition is supported by neither reason nor authority. The simple act of receiving a payment after the day when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and, as to those following, the provisions of the contract are left to operate with unimpaired force."

This is without doubt a correct statement of the rule in such cases. It follows for these reasons that the appellant was not in default, and that the respondent was in default in his payments, and therefore is not entitled to recover.

The judgment must be reversed, and the cause remanded with directions to dismiss the action.

RUDKIN, C. J., CROW, CHADWICK, DUNBAR, GOSE, and FULLERTON, JJ., concur.

PARKER and MORRIS, JJ., took no part.

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Opinion Per Curiam.

[No. 7958. Decided June 15, 1909.]

MARIA MASOERO, *Respondent*, v. J. A. CAMPBELL &
COMPANY *et al.*, *Appellants*.¹

APPEAL—REVIEW—DISMISSAL—CESSATION OF CONTROVERSY. The dismissal of an appeal carries with it the supersedeas granted therein; and hence an appeal from an order denying a motion to vacate the supersedeas will be dismissed, as the controversy has ceased.

Appeal from an order of the superior court for King county, Morris, J., entered March 6, 1909, denying a motion to vacate a supersedeas or restraining order, after a hearing before the court. Dismissed.

Walter A. Keene (*Hastings & Stedman*, of counsel), for appellants.

McBurney & Cummings, for respondent.

PER CURIAM.—An appeal prosecuted in this action from an order denying a temporary injunction was heretofore dismissed by this court. *Masoero v. Campbell & Co.*, 52 Wash. 551, 100 Pac. 1024. After the last-mentioned appeal was taken, the trial court granted a restraining order in the nature of a supersedeas to preserve the fruits of the litigation pending the appeal. The present appeal is prosecuted from an order denying a motion to vacate the supersedeas or restraining order. Inasmuch as the dismissal of the first appeal carried with it the order from which the present appeal is prosecuted, there is no question before us for review, and the appeal is accordingly dismissed.

¹Reported in 102 Pac. 423.

[No. 7689. Decided June 15, 1909.]

FERRY-LEARY LAND COMPANY, *Appellant*, v. HOLT &
JEFFERY *et al.*, *Respondents*.¹

EMINENT DOMAIN—DAMAGES—GRADE OF STREETS—INJUNCTION—DEFENSES—MUNICIPAL CORPORATIONS. In an action to restrain a city from damaging property by sloping land outside the street to a grade established, after condemning plaintiff's land within the street limits, the injunction will be denied where there was some evidence tending to show that in the condemnation suit damages for such sloping were allowed the plaintiff; notwithstanding Const. art 1, § 16, prohibiting the damaging of property without first making compensation, as injunction is not a matter of right; and where such evidence is not clear, the plaintiff will be relegated to its action at law for damages for injury by making the slope, leaving the city to plead anew the allowance therefor in the condemnation case.

Appeal from a judgment of the superior court for King county, Morris, J., entered July 31, 1908, in favor of the defendants, dismissing an action to enjoin a city in the prosecution of a public improvement. Modified.

Roberts & Hulbert, for appellant.

Scott Calhoun, Howard A. Hanson, and O. B. Thorgrimson, for respondents.

FULLERTON, J.—This is an action for injunctive relief. From the record it appears that the appellant is the owner of an eight-acre tract of land in the city of Seattle, on which two substantial residences had been built and which were in use as private homes. The land, in part at least, had been laid out and improved by a landscape gardener, and planted with expensive trees and shrubbery, it being the purpose of its then owner to maintain it as one tract for these homes. In March, 1907, the city of Seattle passed an ordinance directing the extension of Lakeview Avenue, a street of that city, from its then terminal point along a route described in the ordinance to a new terminal fixed therein. The street as ex-

¹Reported in 102 Pac. 445.

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Opinion Per FULLERTON, J.

tended passed through the grounds of the appellant, and an action was begun against it to condemn a right of way on which to construct the street. This proceeding was prosecuted to judgment, and a right of way ninety feet in width was condemned for the use of the street, for which the owners were awarded \$8,500; apportioned by the jury as \$6,000 for the land taken, and \$2,500 for damages accruing to the remainder of the tract.

Thereafter the city established grades across the tract so condemned, and entered into a contract with the respondent, Holt & Jeffery, to open the street in accordance therewith. The plan of the improvement called for a roadway on a certain gradient forty-nine feet wide in the center of the ninety-foot strip; and to give the sides of the excavations in certain places the required slopes, it was found necessary in three or four places to extend the same a few feet beyond the ninety-foot strip onto the private property of the appellant. In the prosecution of the work under its contract, Holt & Jeffery was proceeding to grade in accordance with the stakes set, when the appellant instituted the present action to enjoin it from so doing, asking for a temporary injunction pending the hearing of the main action upon its merits. After the service of process on Holt & Jeffery, the city of Seattle asked, and was granted, leave to intervene as a party defendant, and together with Holt & Jeffery contested the application for a temporary injunction. This application was heard on affidavits, and was denied by the court. Thereupon the parties submitted the main case on the evidence introduced at this hearing, whereupon the court found against the owners, and entered a judgment dismissing the action. From this judgment the owners appeal.

Under § 16, art. 1, of the constitution which provides that private property shall not be taken or damaged for a public use without just compensation having been first made or paid into court for the owner, this court has repeatedly held that a municipality or other public corporation, even though it

had the right to exercise the power of eminent domain, could be enjoined from taking or damaging private property for the use of the public until it had made the compensation required. *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607; *Hart v. Seattle*, 42 Wash. 113, 84 Pac. 640.

The appellant sought to have this rule invoked in the present case, but was met with the defense that its damages for the injury of which it here complains was assessed and paid to it in the proceedings wherein the right of way was condemned. The city in its answer to the appellant's complaint, alleged that the appellant, when the condemnation proceedings were being tried out, was allowed to and did introduce evidence, over the objection of the city, tending to show that it would be damaged by the fact that the city in constructing a road along the way condemned would of necessity cause slopes to be made back upon its land, or perpendicular cuts to be made on the margin of the street line which would compel the appellant either to make such slopes or build retaining walls, and that the jury were instructed that the appellant could recover damages therefor; in other words, the contention is that the appellant recovered in that action damages for the doing of the very things it seeks to enjoin in this.

The evidence introduced, while not clear or very satisfactory, tends, in our opinion, to support the contention of the city, and we think that the question of the amount of damages the appellant would suffer by reason of the actual construction of the road was sought to be tried out in that action. This being true, the city ought not to be compelled to pay these damages over again. But as we say, the evidence is not clear or satisfactory, and while we think it sufficient to deny to the appellant the equitable relief of injunction, we do not feel that it is sufficient to warrant a judgment barring the right of the appellant to re-try the question in

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an action brought to recover damages for the city's act in extending the grade beyond the boundaries of the way condemned. An injunction is an extraordinary remedy, and does not follow as of right even when a case of wrongful act is made out on one side and consequent injury on the other. In equity a decree is of grace rather than of right, and the court will always consider whether it will not do a greater injury by enjoining an act than would result from permitting the act to continue and leaving the party injured to his remedy in damages. So, in the present case, since the appellant has not shown any substantial injury or injury that would entitle it to more than nominal damages, and since the city has the power to condemn the right to do the acts complained of in any event, we feel that the greater wrong will be done in granting the injunction than in denying it.

The judgment appealed from will therefore be modified so as to permit the appellant to bring an action at law to recover any damages it has suffered or will suffer by reason of the construction of the highway according to the plans adopted by the city; granting to the city the right to plead anew the defense that the damages were tried out in the original condemnation suit; in other respects it will stand affirmed. The appellant will recover costs.

RUDKIN, C. J., CROW, CHADWICK, GOSE, and MOUNT, JJ., concur.

DUNBAR, PARKER, and MORRIS, JJ., took no part.

[No. 7677. Decided June 15, 1909.]

ELSIE DE YOE, *Appellant*, v. SEATTLE ELECTRIC COMPANY,
Respondent.¹

CARRIERS—INJURY TO PASSENGERS—STREET CARS—SUDDEN JERKS—PRESUMPTIONS—*RES IPSA LOQUITUR*—EVIDENCE—SUFFICIENCY. There is no presumption of negligence in the starting of a cable car on a steep grade with a sudden jerk, whereby a passenger standing in front was thrown against a window which broke and injured a passenger inside, where jerks in starting were frequent and unavoidable; and there being no other evidence of negligence or any showing as to whether the standing passenger was negligent, a judgment is properly directed for defendant notwithstanding a verdict for the plaintiff.

SAME. The doctrine of *res ipsa loquitur*, as applied to negligence cases, applies only where the accident, in the light of ordinary experience, is inexplicable except as the result of negligence.

RUDKIN, C. J., FULLERTON, CHADWICK, and DUNBAR, JJ., dissent.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 6, 1908, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, dismissing an action for personal injuries. Affirmed.

Vince H. Faben and S. H. Kelleran, for appellant.

James B. Howe and H. S. Elliott, for respondent.

Crow, J.—Action by Elsie De Yoe against the Seattle Electric Company, for personal injuries. From a judgment in favor of the defendant, the plaintiff has appealed.

On a trial of the issues joined by the pleadings, the jury returned a verdict in favor of the appellant, but the trial court thereafter sustained a motion for judgment notwithstanding the verdict, and dismissed the action. The appellant now contends that the court erred in so doing. The evidence shows that the respondent owns a cable car line, which it operates on a very steep grade on Madison street, in the

¹Reported in 102 Pac. 446.

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Opinion Per Caw, J.

city of Seattle; that on September 10, 1907, appellant became a passenger on one of respondent's cars which she entered at First avenue, taking a seat in the forward end of the inclosed portion; that there was also an outside forward apartment for passengers; that at or near the Third avenue crossing, as the car was running up grade, it gave a severe jerk; that a passenger who was standing in the forward outside compartment was thereby thrown against a glass partition or window near which appellant was sitting, breaking the glass, and that the broken glass struck her face, causing serious injuries. The only witnesses produced by appellant, who testified as to the motion of the car, were the appellant herself and one A. J. Hassell. Appellant testified as follows:

"Q. Now, what next happened? A. Well, just as the car started up there was a lurch, and I was hurt when this gentleman on the outside was thrown through the window, his elbow or shoulder went into the glass and broke it to pieces, and run in the side of my face. . . . Q. What caused the car to jerk, if you know? A. Well, I could not say unless it was when the gripman clutched the cable. It may have been taken hold of too sudden or something. I know it was a severe jolt and caused the passengers to sway that were standing up, and those in the seats slipped to the back end of the car. Q. What, if you know, caused this man to come through the window; was it the jerk? A. Yes, sir. Q. And you don't know what caused the jerk, whether it was the taking up of the cable by the grip, or the taking up of the slack of the cable, or not; you don't know what it was? A. I know it was when the car started."

The witness Hassell testified on the same subject as follows:

"Q. Was there any considerable jerk? A. Well, now, I couldn't say in comparison. There was a jerk of the car. . . . Q. Did you hold on to the strap all of the way, or did you lose the strap? A. I think I hung on to the same strap until I got off at Fourth. Q. Did the jar wrench your hand any? A. No, sir. Q. You still held on to the strap? A. Yes, sir."

No other evidence as to the happening, or cause of the accident, or the jerking of the car was offered. The respondent produced evidence indisputably showing that a jerk, such as the one described by appellant and Hassell, was not an unusual occurrence in a cable car; that it was unavoidable, and that such a car, although handled in the most skillful and careful manner, could not be operated without frequent lurches and jerks. The appellant insists that the direct effect of the evidence produced by her was to show that the severe jerk caused the passenger who was standing outside to be forced through the window, thereby breaking the glass and injuring her; that the doctrine of *res ipsa loquitur* should be applied; that a *prima facie* case of negligence was shown against the respondent, which shifted to it the burden of showing that the jerk which caused the accident did not result from its negligence; that such *prima facie* case arising from the application of the doctrine of *res ipsa loquitur* was sufficient to carry the issue of respondent's negligence to the jury and sustain a verdict in favor of appellant; and that it was then within the sole province of the jury to determine whether the evidence offered by respondent was of sufficient weight and credibility to rebut appellant's *prima facie* case, to relieve respondent from the charge of negligence, and to prevent a recovery by appellant. In support of this contention appellant cites, with others, the following cases from this court, upon which she especially relies: *Firebaugh v. Seattle Elec. Co.*, 40 Wash. 658, 82 Pac. 995, 111 Am. St. 990, 2 L. R. A. (N. S.) 836; *Williams v. Spokane Falls & N. R. Co.*, 39 Wash. 77, 80 Pac. 1100; *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 16 L. R. A. (N. S.) 931.

The doctrine contended for was applied in the cases cited, but in each of them the nature of the accident itself was such as to make it manifest not only that the accident occurred, but also that it could not have occurred without some negligence upon the part of the defendant, the character and cause

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of which, if known at all, would be peculiarly within the knowledge of the defendant. It was evident in the *Firebaugh* case that the explosion would not have taken place if the apparatus had been in good working order and properly handled; in the *Williams* case, that the collision would not have occurred if the coupler had not parted and negligent switching had not been done; and in the *Anderson* case, that the basket would not have fallen if it had been properly adjusted and operated. It was apparent that the occurrences mentioned were, each and all of them, unexpected and exceptional events, out of the usual order of things; while in this action the jerk complained of was an incident of frequent occurrence in the operation of cable cars, consistent with care and proper equipment, which by its mere happening does not raise any presumption of negligence on the part of the respondent, and invoke the application of the doctrine of *res ipsa loquitur*. It is common knowledge that frequent jerks of a cable car result from its ordinary operation. The gripman could not use the cable to propel the car without frequent jerks or jolts. Were we to apply the doctrine of *res ipsa loquitur* to this action, the effect would be to render it impossible for a transportation company to operate cable cars in the most skillful manner without making a *prima facie* case of negligence against it every time an unavoidable jerk or jolt occurred.

In the *Firebaugh* case this court stated the true doctrine in the following language:

"The rule of *res ipsa loquitur* is based upon the apparent fact that the accident could not have happened without negligence on the part of the carrier; or, upon the literal meaning of the expression, that the thing itself speaks, and shows *prima facie* that the carrier was negligent."

In *Bartley v. Metropolitan Street R. Co.*, 148 Mo. 124, 49 S. W. 840, the court said:

"It is a matter of common knowledge, of which even a court is not ignorant, as well as a matter of physics, that

the rope of a cable railroad cannot be kept taut and that the jerks, which are common and unavoidable to such roads, are caused by the slack in the rope being taken up. In order to recover from a cable railroad, it is not enough to show that there was a jerk, but it must affirmatively appear that the jerk was an extraordinary or unusual one, or attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskillful handling of the car by the gripman. (*Adams v. Railroad*, 9 App. D. C. 26; *Weaver v. Railroad*, 3 App. D. C. 436; *Railroad v. Snashall*, 3 App. D. C. 420; *Hayes v. Railroad*, 97 N. Y. 259; *Stager v. Railroad*, 119 Pa. St. 70, 12 Atl. 821; *Mitchell v. Railroad*, 51 Mich. 236, 16 N. W. 388; *Muller v. Railroad*, 48 N. Y. Superior Ct. Rep. 546; *Holland v. Railroad*, 155 Mass. 387, 29 N. E. 622; *Stewart v. Railroad*, 146 Mass. 605, 16 N. E. 466; *Railroad v. Cason*, 72 Md. 377, 20 Atl. 113). Clearly, the testimony in this case does not show anything extraordinary or unusual in the jerk; no defect in the track or car or apparatus is shown, and no negligence of the gripman is made to appear. It was therefore the duty of the trial court to so declare, and to sustain the demurrer to the evidence at the close of the plaintiff's case, and it was error on its part not to do so."

In *Black v. Third Avenue R. Co.*, 37 N. Y. Supp. 830, it was held that negligence on the part of those in charge of a cable car cannot be inferred merely from the fact that, as a plaintiff was about to take his seat, he was thrown to the floor by the sudden starting of the car, there being no evidence that any negligence or any unusual force was applied by the gripman. That case has been followed and approved in: *Needham v. Interborough Rapid Transit Co.*, 95 N. Y. Supp. 561; *Molloy v. New York City R. Co.*, 98 N. Y. Supp. 211; and *Bollinger v. Interurban Street R. Co.*, 98 N. Y. Supp. 641.

The courts have repeatedly held that a sudden jerk of a cable car does not necessarily raise a presumption of negligence on the part of the carrier. Such jerks are frequently incident to the operation of cable cars as a large number of them are repeatedly connected with, and released from, the

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same cable, thereby affecting each other's movements. This is a matter of common knowledge, which passengers are presumed to anticipate. There was no evidence in the trial of this action to show the position of the passenger, who appellant claims was forced through the glass; that is, whether he was standing carelessly and without support just previous to the accident. A slight jolt of the car while traveling up grade, accompanied by his carelessness, may have caused him to lurch against the glass, without the least possible negligence on respondent's part. The lower half of the window was protected with iron rods to guard against accidents. A sudden jerk on a passenger train of a steam railroad, or on a street car propelled by electricity, might be held to raise a presumption of negligence on the part of the carrier, which, in the case of a cable car, would be held to be consistent with careful operation.

The trial judge undoubtedly granted the motion for judgment notwithstanding the verdict for the reason that there was no proof of negligence on respondent's part, and that he had improperly denied respondent's previous motion for a directed verdict. The judgment is affirmed.

RUDKIN, C. J., MOUNT, GOSE, PARKER, CHADWICK, and MORRIS, JJ., concur.

ON REHEARING.

[*En Banc*. Decided October 30, 1909.]

CROW, J.—Upon appellant's petition for a rehearing, this cause has been again presented to this court, sitting *en banc*, but after further consideration we have concluded to adhere to our former opinion.

Appellant's controlling contention, again urged on the rehearing, is that she is entitled to successfully invoke the rule of *res ipsa loquitur*, by reason of the single established fact that, without fault of her own, she was injured while traveling on respondent's car. In other words, she insists that the mere happening of an accident causing injury to a passenger,

without fault on his part, necessarily gives rise to such a presumption of negligence of the carrier as to make a *prima facie* case, and entitle the passenger to a recovery of damages for the injuries sustained. We regard this as being too broad a statement of the doctrine. The phrase *res ipsa loquitur*, as applied to negligence cases, is used to give expression to the idea that, when an accident is shown to be of such a character as, in the light of ordinary experience, is inexplicable except as the result of negligence, then negligence will be presumed. The accidents in *Firebaugh v. Seattle Elec. Co.*, 40 Wash. 658, 82 Pac. 995, 111 Am. St. 990, 2 L. R. A. (N. S.) 836; *Williams v. Spokane Falls & Northern R. Co.*, 39 Wash. 77, 80 Pac. 1100, and *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 16 L. R. A. (N. S.) 931, were of such a character as, in the light of ordinary experience, were explainable from the standpoint of the plaintiff by the presumption of negligence only. Each and all of them were unusual, not to be ordinarily anticipated, and inconsistent with the idea of careful operation. No such showing is made in this case, the undisputed evidence being that jerks of a cable car are of ordinary occurrence, consistent with careful operation, and that they frequently happen without any act of negligence upon the part of the carrier.

In *Yazoo & M. V. R. Co. v. Humphrey*, 83 Miss. 721, 741, 36 South. 154, the court, discussing the doctrine of *res ipsa loquitur*, said:

"There is a large and well defined class of cases in which for injuries to passengers the negligence of the carrier is implied from the mere happening of the accident. In such cases proof of injury to the passenger joined to proof of the accident makes out against the carrier a *prima facie* case of failure to observe that high degree of care required of it under the law, and, if not rebutted, entitles the plaintiff to recover. This rule applies when a passenger train strikes an animal on the track and a passenger is thereby injured, or when the injury results from a collision between two trains on the same track, and other similar instances. . . . But this rule does not apply to all cases of injuries to passengers,

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but only to such as are caused by happenings not ordinarily incident to the prosecution of the carrier's business in the customary manner, or by such accidents as do not usually occur without negligence on the part of the carrier."

See, also, *Hoffman v. Third Avenue R. Co.*, 45 App. Div. 586, 61 N. Y. Supp. 590.

In *Merrill v. Metropolitan St. R. Co.*, 73 App. Div. 401, 77 N. Y. Supp. 122, an injury was sustained by the plaintiff while a passenger on the defendant's street car, in consequence of the fact that another passenger, in the act of entering the car from the platform, was thrown against her by a violent jerk or jolt of the car. Yet the court held that, in the absence of any further evidence of negligence of the defendant, the plaintiff would not be entitled to recover.

If a passenger on a railway train or street car should be injured as the result of a derailment, a head-on collision, or some similar accident, a different state of facts would be presented, and the doctrine of *res ipsa loquitur* would undoubtedly apply, the occurrence being such an unusual one, and of such a character as to be explained only on the theory of some act of negligence on the part of the carrier or its servants, unknown to the passenger. The undisputed evidence in this case being that jerks upon a cable car are of ordinary occurrence, unavoidable, and consistent with careful operation, and no additional evidence to show negligence being presented, the judgment must be affirmed. It is so ordered.

MOUNT, PARKER, MORRIS, and GOSE, JJ., concur.

RUDKIN, C. J. (dissenting).—The appellant was seriously injured while riding on a street car operated by the respondent company. There is no claim that she was guilty of contributory negligence, nor is it seriously claimed that the injury was the result of an unavoidable accident. It must therefore be attributable to one of three causes; first, negligent operation of the car; second, negligent construction of the car which would permit of such an injury to a passenger; or, third, the independent negligence of a fellow passenger.

For the first two causes the respondent is answerable, and the finding of the jury against it is in my opinion supported by competent testimony. I therefore dissent.

FULLERTON, CHADWICK, and DUNBAR, JJ., concur with RUDKIN, C. J.

[No. 8000. Department One. June 15, 1909.]

CHARLES JACKSON, *Respondent*, v. DANAHER LUMBER
COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—CUSTOM—QUESTION FOR JURY. An employee who had worked in a mill but seven days does not assume the risks and is not guilty of contributory negligence, as a matter of law, in leaving the mill after work by going over the roller bed in accordance with the custom of the workmen, where there was no safe way especially provided and he was following the head sawyer, who was familiar with the mill, and his injury was due to the raising of a jump saw, without notice or warning, by an employee who was about to file the saw.

MASTER AND SERVANT—FELLOW SERVANTS—DIFFERENT DEPARTMENTS. A saw filer under direction of the foreman of a mill is not a fellow servant of a dogger who works under the head sawyer, as to an injury inflicted by the filer's raising a jump saw without warning, in an unusual manner, just as the dogger was stepping over the slot on his way out of the mill.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 14, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Affirmed.

Hudson & Holt, for appellant.

Burkey, O'Brien & Burkey, for respondent.

CHADWICK, J.—Plaintiff was employed as a dogger in a sawmill operated by defendant at Tacoma, Washington. One

¹Reported in 102 Pac. 416.

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McBane, under whose immediate direction he worked, was head sawyer, and one Marble was filer. It was a part of the plaintiff's duty to assist the head sawyer in changing the band saw at the log carriage in the mill. This work was generally done at noon after the mill had been shut down for the lunch hour. The physical situation of the machinery in the mill was about as it is in all sawmills; a log carriage upon which the logs were placed for cutting carried the logs to the main saw; the cants fell upon a set of live rolls, operated by a first offbearer with a lever arranged for that purpose; the cants were directed over the rolls by a second offbearer, and were either canted over to a set of rollers which would carry them to and through the edger, or they were allowed to pass on to the trimming saw or trimming transfer, and thence on out of the mill. The live rolls ran on a platform about "hip high;" and at a point about thirty feet from the band saw there was a slot, in which, or rather out of which, a jump or cut-off saw was operated by means of a lever which was also controlled by the first offbearer.

It will be seen that, when the band saw was running, it did not follow that the live rolls or jump saw were in motion; their movements depended on a friction clutch which gathered power from the main shaft of the mill. When not raised for the purpose of cutting off long timbers or for the purpose of being changed, this jump saw was concealed. It was the duty of Marble, the filer, to change the jump saw when it had become dulled from use. During the forenoon he had been directed to do this, and at noon, after the band saw had been changed, he set about to do as he had been directed. In this work he was generally assisted by the first offbearer who raised the saw by means of the lever while he blocked it from the floor below.

On this particular occasion, the place of the regular offbearer was filled by a green hand, a Japanese who had no understanding of the English language and who was unfamiliar with the manner of raising the jump saw. Marble

went to the floor below, where he directed the engineer to start the machinery enough to enable him to raise the saw. This he did with the assistance of the engineer. Just after changing the band saw, plaintiff and McBane went to the filing room to change their clothes, and started out of the building. They went down a few steps, crossed over past the levers which we have mentioned and at which no one was standing, stepped on a plank laid parallel with the roller bed and about a foot from the floor, provided for the second offbearer to stand upon, then upon the roller bed, thence along it toward the south end of the mill. McBane had passed over the slot where the jump saw was concealed, but just as plaintiff was passing over it, it was raised by Marble and the engineer from below and, being in motion, cut and injured his foot. This action is prosecuted to recover damages. From a verdict in favor of plaintiff, defendant has appealed.

The assignments of error are three in number: (1) That the court erred in denying appellant's motion for judgment at the conclusion of respondent's testimony; (2) in denying a like motion when all the evidence was in, and (3) in refusing to give a peremptory instruction to the jury to return a verdict for defendant. The defenses relied upon are contributory negligence, assumption of risk, and the doctrine of fellow servant.

The testimony shows that there were four and possibly five ways in which respondent could have departed from the mill at the particular time, and escaped injury; but the testimony fairly shows, and the jury must have found, that there was in fact no way provided especially for such purpose. Respondent might have passed over the log carriage if it had been in proper position, and thence out of the mill by the south door, but in doing so he would have also passed over the roller bed and at some distance from the jump saw; or he might have passed out by way of the opening between the edger and the roller bed. He might have gone out around

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the north side of the log carriage, in which event he would have passed over the log chute. It may be seen that, in any event, his way would have led over or by machinery or places dangerous in greater or less degree. There were opportunities to go out of the mill, but no open way inviting the workmen to its use. Furthermore, it was the custom of the workmen to pass in and out over the live rolls. This is abundantly shown by the testimony, and is emphasized by the fact that McBane, the head sawyer, led the way. The custom is also admitted by Marble, the saw filer. McBane was better acquainted with the mill than was the respondent, who had been employed not to exceed seven days, and who had no notice or knowledge of the methods about to be employed by Marble for raising the jump saw.

It is urged that pursuit of a negligent custom cannot be relied upon as a basis for damages. This we admit. But it is a rule that is not without qualification. It is based upon the proposition that there were other safe ways, an assumption which we are not willing to indorse in the instant case. We have said there was no way provided and primarily intended for the use of the workmen in entering and going out of the mill. Workmen were in the habit of using the roller way. The fact that the engine was moving slowly was no notice to the respondent of any danger. He knew that it was customary to raise the jump saw and start the live rolls by the use of the levers provided for that purpose. There was no person at the levers to indicate that either the saw or the rolls might be brought into instant use; and for these reasons we are unwilling to hold, as a matter of law, that respondent assumed the risk or was guilty of negligence in following the custom of the mill hands. In principle we are unable to differentiate this case from the case of *Sturgeon v. Tacoma Eastern R. Co.*, 48 Wash. 366, 93 Pac. 526, wherein the court said:

"The respondent contends that the wood rack in question was not intended for use as a ladder by trainmen in boarding

cars, but there was no testimony on this point. On the other hand, trainmen of years of experience testified that it is customary, not only on respondent's road but on all railroads, for brakemen to board cars such as this in the identical manner in which the appellant attempted to board the car in question. If this custom prevailed and was known to the respondent, or should have been known by the exercise of reasonable diligence, it became its duty to make its wood racks reasonably safe for the purpose for which they were habitually used, regardless of the purpose they were originally intended to subserve."

From the cases in support of the rule that bars a recovery where the servant voluntarily selects an unsafe or dangerous way when he might have selected a safe one, Mr. Labatt deduces this conclusion:

"The rule thus laid down is evidently intended to be applied only when the method adopted was essentially unsafe, and the other was apparently safe. It will be observed that this conception emerges more or less distinctly in the statements of the rule already given. That it determines, whether expressly adverted to or not, the actual extent and scope of the rule is apparent from the consideration that a doctrine which should predicate negligence, as a matter of law, in cases where the servant is merely chargeable with having adopted the less safe of the two courses which were both reasonably safe, would contravene the fundamental principle by which the standard of due care is declared to be the hypothetical conduct of a prudent person under the given circumstances." Labatt, Master and Servant, p. 841.

In *Kingma v. Chicago & N. W. R. Co.*, 85 Ill. App. 138, the court held that it could not hold a section hand, who was struck and injured by a train while walking on the track, when there were several ways over which he could have traveled in safety, guilty of contributory negligence as a matter of law. Such cases must go to the jury under proper instructions based upon the facts of the particular case, saving the question whether the servant did that which an ordinarily prudent man would have done under like circumstances.

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Nor do we think that appellant should be excused on the ground that respondent was a fellow servant of Marble. Aside from the questions that arise from the evidence as to their employment, whether common or otherwise, it is admitted that respondent was under the direction and order of the head sawyer, while Marble was under the direction of the foreman of the mill. Respondent had no opportunity of knowing whether Marble performed his work in a careful or negligent manner. These considerations easily bring the case within the rule that the question of fellow servant should not be measured by the rank or station of the employee under whose direction the act was performed, but by the character of the act itself.

In Cooley on Torts (3d ed.), p. 1073, the rule announced in *Mast v. Kern*, 34 Ore. 247, 54 Pac. 950, 75 Am. St. 580, is quoted, among other authorities, as follows:

"The rule 'now unquestionably established and supported by the great weight of authority, both in this country and in England, is that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employe. . . . The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a co-servant, is, was the offending employe in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows; if not, he was a mere co-servant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them.'"

See, also, *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814.

It cannot be denied that it was the duty of the master to provide not only a safe place for the employees to work, but a safe way of going in and coming out of the mill. No way

being provided, the servant adopted a customary way, a safe way but for the raising of the saw in an unusual manner, occasioned by failure on the master's part to employ a competent offbearer who could man the lever and obey the orders given by Marble. If Marble, then, assumed to overcome the dereliction of the master in this behalf by acting without the assistance of a competent man to raise the saw in the customary way, it was his duty to warn other employees whom he knew might, as he admits he did upon occasion, use the roller bed when the mill was not running, as a passageway in and out of the mill. He assumed the duty of the master. His failure to perform his full duty was the proximate cause of the injury, and appellant was rightfully charged with his delinquency. *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Nelson v. Willey S. S. & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326; *Larsen v. Covington Lumber Co.*, ante p. 147, 101 Pac. 717.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 7802. Decided June 17, 1909.]

S. M. ARCHIBALD, *Appellant*, v. F. J. HAHN *et al.*,
Respondents.¹

SALES—ACTION FOR PRICE—DEFENSES—FRAUD—ESTOPPEL—CORPORATE STOCK. The purchaser of corporate stock is not estopped, by his delay in offering to return it, from setting up fraud and want of consideration as a defense to an action for the price, where the sale was made October 16, 1907, the fraud was discovered December 15, 1907, and the action was commenced February 3, 1908.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 26, 1908, upon findings in

¹Reported in 102 Pac. 656.

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Opinion Per FULLERTON, J.

favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. **Affirmed.**

Blaine, Tucker & Hyland, for appellant.

Alfred E. Parker, for respondents.

FULLERTON, J.—On October 16, 1907, the respondent F. J. Hahn entered into a written contract with one William Frankfurt, by the terms of which Hahn agreed to purchase of Frankfurt 25,000 shares of the capital stock of the Low Creek Copper Company, at the stipulated price of \$2,500. At the time the contract was executed, stock of the face value of \$25,000 was delivered to Hahn, and he paid \$200 on the purchase price and subsequently \$150 more. Thereafter the contract was assigned to the appellant, who brought the present action to recover the balance of the contract price. The respondent defended on the ground that the stock was worthless at the time he agreed to purchase it, a fact well known to Frankfurt, and that he purchased it without knowledge of the fact that it was worthless, relying on the false and fraudulent representations of Frankfurt to the effect that it was of value. The cause was tried by the court without a jury, and resulted in findings and a judgment in favor of the respondents.

A perusal of the evidence convinces us that the court was justified in finding that the mining stock was worthless, that Frankfurt knew this fact when he contracted to sell it to the respondent F. J. Hahn, and that he induced him to purchase it by false representations as to its value. The appellant insists in this court, however, that the respondent is estopped to make this defense because he kept possession of the mining stock delivered to him under the contract, making no offer to return it until after the commencement of this action, although he knew at a considerable time before that the stock was worthless. But the contract of purchase was entered into on October 16, 1907, Hahn discovered its worthlessness on December 15, 1907, and this action was begun on Febru-

ary 3, 1908. There was not here such a delay as to bar the defense of fraud and want of consideration.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, MOUNT, and CROW, JJ.,
concur.

[No. 7811. Decided June 17, 1909.]

MICHIGAN LUMBER COMPANY, *Respondent*, v. H. B. WAITE
LUMBER COMPANY, *Appellant*.¹

SALES—ORDERS—NEGLIGENCE IN FURNISHING DUPLICATES—LOSS BY
ADVANCE IN PRICE. Where orders for lumber were lost, and the purchaser undertook to furnish duplicate copies and negligently omitted several items, and after the orders were filled according to such duplicates, the price of lumber advanced, the purchaser must stand the loss on the omitted items because of its negligence; since the vendor might have protected itself before the advance.

SAME—MISTAKE IN DUPLICATE AS TO CHARGES—EFFECT. In such a case, where the duplicate orders by mistake omitted a charge for freight to be borne by the vendor, the vendor must pay such charge according to the original sale, as there was no new contract nor any injury to the vendor by the mistake as to the freight.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 25, 1908, upon findings in favor of the plaintiff, after a trial upon stipulated facts, in an action on contract. Modified.

Shank & Smith, for appellant.

Herr, Bayley & Wilson, for respondent.

FULLERTON, J.—The respondent brought this action against the appellant to recover a balance alleged to be due on a contract for the sale of lumber. The facts were stipulated, and are in substance these: The respondent is engaged in the business of manufacturing and selling lumber, and operates a lumber mill at Aberdeen, Washington. The

¹Reported in 102 Pac. 450.

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appellant is engaged in the business of buying and selling lumber, having an office at Seattle, Washington. On November 18, 1905, the appellant gave to the respondent two certain written orders for lumber, each specifying the dimensions and quality of the lumber desired, and the terms and conditions on which it would be purchased. The respondent accepted the orders, and agreed to fill them according to their terms.

Soon after the orders had been accepted by the respondent, and before any action had been taken towards filling them, they became lost or destroyed through the acts of one Rowland, an employee of the respondent. Immediately on discovering the loss, about November 25, 1905, the respondent sent to the appellant a telegram as follows: "Send immediately duplicates of last orders. Rowland took our copies." In response to the telegram, the appellant forwarded what purported to be copies of the original orders, but which in fact differed from them materially; the copy of the one omitting two considerable items of lumber contained in the original, and the other showed the freight rate which the respondent was to pay to be limited to 50c. per hundred, whereas the original order provided that the respondent should pay the entire freight to the point of destination.

Some nine months later the respondent filled the orders according to the copies, whereupon the appellant discovered for the first time that a mistake had been made in the copies, and requested the respondent to fill the orders according to the originals. The price of lumber had advanced materially since the original orders were given, and the respondent refused to comply with the request. The appellant thereupon purchased in the open market the lumber omitted from the original order, paying therefor \$159.44 in excess of the price for which the respondent agreed to furnish the same. It also paid the freight in excess of the 50c. rate, amounting to \$42.33. These sums it charged to the respondent's account, and their total constitutes the sum sued for in this action.

It is agreed further that the respondent in filling the duplicate orders believed them to be exact copies of the originals; that the appellant when furnishing them supposed them to be complete copies of the originals; and that neither of the parties knew of the discrepancy between the copies and the originals until after the orders had been filled and the lumber shipped. On the foregoing facts the trial judge held that the respondent was entitled to recover, and entered judgment accordingly. This appeal is taken therefrom.

In so far as the court allowed the respondent to recover for the sum withheld to replace the omitted items of lumber, we think its judgment right. The appellant, it is true, was under no obligation to supply the respondent with copies of the original orders. It could have refused, and if the respondent failed to furnish the lumber according to the orders within a reasonable time, could have recovered against it for breach of contract. But when it undertook to duplicate the original orders at the respondent's request, whether gratuitously or not, it was bound to exercise ordinary care in the performance of the undertaking. And it was not ordinary care, we think, for the appellant to omit in its copy two principal items of the original. The separate items in the statement were not numerous; being in fact only ten in number. Even a casual effort at comparison after the copy was made would have discovered the error, and not to discover it was negligence.

Since the loss occurred as the result of the appellant's negligence, it follows that it must bear it. In this connection, however, it makes the contention that there is no proof that the respondent will suffer loss by being required to make good the omitted items, or that it will suffer any loss by reason of the error, since it would have been required to furnish the missing items had it not lost the original orders. But the stipulation shows that it cost the appellant the sum of \$159.44 in addition to the contract price to procure the lumber described in the omitted items in the open market, and

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there is no evidence that the respondent could have procured it at any less cost. Nor is there any evidence that it lost this sum by reason of its original bargain, or that it would have lost it had it not misplaced the original order. The stipulation shows that the advance in the price of lumber occurred at a time subsequent to the time the orders were given, and the presumption is that the respondent, had the duplicate orders been correct, would have protected itself against loss from the fluctuations of the market by contracting for the necessary material and labor at the time it agreed to fill them.

With reference to the freight item, we think the judgment wrong. The respondent obligated itself to pay the entire freight charges, and there was no new contract in this regard, nor any evidence or presumption that the respondent was injured in any manner by this mistake.

The judgment appealed from will be reversed, and remanded with instructions to modify the judgment in accordance with this opinion.

RUDKIN, C. J., GOSE, DUNBAR, MOUNT, CHADWICK, and CROW, JJ., concur.

[No. 7858. Decided June 17, 1909.]

THE STATE OF WASHINGTON, *on the Relation of William W. Seymour, Appellant*, v. THOMAS SLATER *et al.*,
Respondents.¹

DRAINAGE—ASSESSMENTS—MANDAMUS TO COMPEL—LIMITATION OF ACTIONS. The right of a county to make an assessment on property benefited by a drain being barred by the lapse of ten years, a proceeding by holders of void warrants to compel the county by mandamus to make a reassessment is barred by the lapse of the same time.

SAME—REFUSAL. In such a case, the fact that the commissioners, upon request made, had not refused to proceed, would not affect the running of the statute, as the property owners could successfully make the defense.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered November 23, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to compel the levying of assessments to pay warrants drawn in payment of the construction of drainage ditches. Affirmed.

Frank D. Nash and *C. H. Hurlbut*, for appellant.

Virgil Peringer and *George Livesey*, for respondents.

FULLERTON, J.—In the years 1891, 1892, 1893, and 1894, the county commissioners of Whatcom county, acting pursuant to the act of the legislature of March 19, 1890, authorized and commenced the construction of several drainage ditches in that county, intending to pay the cost of construction by assessment levied upon the lands benefited by the ditches. During the course of the construction work, numerous warrants were issued to persons engaged therein, drawn on the general fund of the county but to be paid in fact out of the fund arising from the special assessments above mentioned. Before the work was completed this court held the

¹Reported in 102 Pac. 651.

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act under which the proceedings were being had unconstitutional; the effect of the decision being to nullify the proceedings of the commissioners and make void the warrants issued. In 1895 the legislature passed an act (Laws 1895, p. 271), free from the defects which were held to render the first one nugatory, providing therein for the completion of the ditches begun under the earlier act, for assessing the lands benefited to pay the costs originally expended on the construction as well as the cost of completing the ditches, and making it the duty of the county commissioners to provide for the payment of indebtedness incurred under the void law.

The relator, who is the owner and holder of a number of warrants issued as before mentioned, at various times after the passage of the act of 1895, requested the county commissioners of Whatcom county to proceed under that law and make such assessments on the property benefited as would be necessary to pay off the warrants held by him. This the commissioners repeatedly promised to do, but failing therein, this proceeding in mandamus was begun to compel them to act. At the hearing the trial court found the facts substantially as we have narrated them, and further found that more than ten years had elapsed since the warrants were issued, and more than ten years had elapsed since the enactment of the law of 1895, and that the owners of the lands benefited by the construction of the ditches, if any such there were, could and would plead the statute of limitations as a defense to any assessment the commissioners might attempt to levy thereon, or to the payment of the indebtedness represented by the warrants should the assessment be made, and thereupon refused to issue the writ.

But one question is suggested by the record, namely, did the finding with reference to the statute of limitations justify the refusal of the court to grant the writ? That the county commissioners may avail themselves of this plea, was deter-

mined by this court in the case of *Frye v. Mount Vernon*, 42 Wash. 268, 84 Pac. 864. In that case mandamus was sought against the town council of the town of Mount Vernon to compel them to assess certain real property to pay outstanding warrants issued in payment of the cost of the improvement of a street. The council, for a defense to the writ, sought to show that the improvement had been made, and that the warrants had been issued, more than ten years prior to the institution of the proceedings, and that any assessment they might levy could not be enforced because of the statute of limitations. The trial court held that this plea was not open to the city council, that it was a right resting with the property owners, who might or might not desire to avail themselves of it, and granted the writ. This court reversed the judgment, holding that to require the town council to make a levy under the circumstances would only result in subjecting the municipality to vexatious and unnecessary litigation, without any corresponding benefit.

It is urged, however, that there is a special reason why the commissioners cannot avail themselves of this plea in this action. It is said that they have, by their conduct, misled the appellant; that from time to time, before the statute had run, the appellant urged the commissioners to make an assessment, and received their promise to do so, and relying thereon permitted ten years to expire before taking action; that mandamus against the commissioners would not lie at the appellant's suit until the commissioners had definitely refused to act, and that such refusal was not made definite until after the statute had run. But these contentions are not tenable. If the right to avail themselves of the plea of the statute rested with the commissioners alone, affecting their property or the property of the county over which they have control, the argument possibly might be sound. But the county commissioners do not represent the landowners, who it is found would urge the statute. On the contrary, the commissioners act in hostility to them, and the

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Statement of Case.

dallying tactics of the commissioners in no manner estops them. Nor is it true that the appellant could not proceed until the commissioners had definitely refused to act. The commissioners, no doubt, had a reasonable time after the request to proceed was made in which to act, but if they did not act within a reasonable time, mandamus would lie against them, no matter how fair their promises might have been.

This case is not controlled by the cases of *Espy Estate Co. v. Pacific County*, 40 Wash. 67, 82 Pac. 129, and *State ex rel. Ames v. Lewis County*, 45 Wash. 423, 88 Pac. 760. These cases, it is true, are cases where this court held that the county commissioners could be compelled by mandamus to make an assessment under conditions similar to those existing in the present case, but in neither of them was involved the right of the landowner, on whose property the assessment must be made, to plead the statute of limitations.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, MOUNT, and CROW, JJ.,
concur.

[No. 8092. Department One. June 19, 1909.]

EVA HOLCOMB, *Respondent*, v. AUGUSTUS H. HOLCOMB,
Appellant.¹

DIVORCE—ALIMONY—INABILITY TO PAY—CONTEMPT—DEFENSES—
EVIDENCE—SUFFICIENCY. Pecuniary inability is a complete defense to contempt proceedings for failure to pay alimony; and the same is established by clear and satisfactory proof, where it appears that the defendant was a dentist, with no property except office furniture and instruments used in his practice, which were subject to a mortgage indebtedness of \$1,200 or \$1,500, that his income from the date of the decree fell short of his living expenses, and he was hopelessly insolvent.

Appeal from an order of the superior court for King county, Frater, J., entered December 22, 1908, upon findings

¹Reported in 102 Pac. 653.

in favor of the plaintiff, adjudging the defendant guilty of contempt and committing him to jail for failure to pay alimony awarded by a decree of divorce, after a trial on the merits before the court. Reversed.

Herbert E. Snook, for appellant.

Thomas B. MacMahon, for respondent.

RUDKIN, C. J.—On the 2d day of December, 1907, a decree of divorce was entered in favor of the plaintiff in the above entitled action. By the terms of that decree there was awarded to the plaintiff three lots in the city of Seattle, the household goods and furniture belonging to the community, a promissory note of \$1,800 secured by mortgage, and \$50 per month alimony, payable on the first day of each and every month, commencing with the month of December, 1907. There was awarded to the defendant his office furniture and fixtures, his dental instruments and supplies, and three lots in Lake View Cemetery the purchase price of which had not been paid.

On the 3d day of December, 1908, a petition was filed in the action averring that the defendant had failed and refused to pay the alimony awarded by the decree, from January 1, 1908, to December 1, 1908, inclusive. An order was entered on the same day citing the defendant to appear and show cause, if any he had, why he should not be punished as for a contempt for failure to comply with the terms of the divorce decree. The defendant appeared in obedience to the citation and a hearing was had. The court found that the defendant was financially able to comply with the terms of the decree, and ordered him to pay into court *instantly* the sum of \$100, and committed him to the jail of King county until that sum, together with the costs of the proceeding, was paid. From this order and commitment, the defendant has appealed.

The sole defense to the show cause order was that the appellant had neither the means nor the ability to comply with

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the terms of the decree. If this defense was established by clear and satisfactory proof the judgment must be reversed, for it is always a defense to a proceeding of this kind to show that the disobedience was not wilful, but was the result of pecuniary inability or other misfortunes over which the accused had no control. *Walton v. Walton*, 54 N. J. Eq. 607, 35 Atl. 289; *Newhouse v. Newhouse*, 14 Ore. 290, 12 Pac. 422; *Peel v. Peel*, 50 Iowa 521; *Schuele v. Schuele*, 57 Ill. App. 189; 9 Cyc. 14.

Turning now to the testimony, the record shows the following facts, without apparent contradiction: The appellant is a dentist by profession and has no means or property of any kind, except his office furniture and the instruments and appliances used in the practice of his profession, which are mortgaged to secure an indebtedness of from \$1,200 to \$1,500. His only income is from his profession, and from the date of the decree of the divorce up to the trial of the present proceeding the income from his office fell far below his office and living expenses. His entire indebtedness exceeds \$4,000, he is hopelessly insolvent at the present time, and the prospects for the future are by no means bright. Under such circumstances we think the finding that he had the financial ability to comply with the terms of the decree was not warranted. If we are permitted to refer to the opinion of the trial judge, it appears therefrom that the judgment was based upon the fact that the appellant was able to prosecute appeals and give supersedeas bonds in the past, rather than upon the testimony or the absence of testimony. But the fact that the appellant's mother may have heretofore advanced money to pay alimony, or the fact that his brother may have given security to keep him out of prison, affords no sufficient basis for the order appealed from. We think the inability of the appellant to comply with the terms of the decree was clearly shown, and the order is therefore reversed, without costs to either party.

FULLERTON, MORRIS, CHADWICK, and GOSE, JJ., concur.

[No. 7572. Decided June 22, 1909.]

EUGENE F. LAWSON, *Respondent*, v. BLACK DIAMOND COAL MINING COMPANY, *Appellant*.¹

BROKERS—EMPLOYMENT—COMPENSATION—TIME LIMIT—WAIVER—SALE EFFECTED. Brokers authorized by a corporation to sell a mine within sixty days, are entitled to commissions, and the sixty-day limitation is waived, where the authorized agent of the corporation thereafter repeatedly urged them to continue their services, and they were not notified to cease their operations until a year later at a time when the corporation's agent had effected a sale to the brokers' customer at a less price, which sale was ratified by the corporation; as knowledge of the authorized agent was the knowledge of the corporation when it accepted the benefits of the sale.

SAME—AMOUNT OF COMMISSION. Where brokers were authorized to effect a sale at a certain price at a commission of five per cent., and the owner, without terminating the employment, made a sale to the broker's customer at a less sum, the brokers are entitled to a commission of five per cent on the selling price.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—MATTERS OTHERWISE ESTABLISHED. In an action triable *de novo* on appeal it is harmless error to exclude evidence to negative authority to employ a broker, where the excluded evidence is in the record, and without regard thereto an authorized employment was subsequently made.

APPEAL—REVIEW—PLEADINGS—AMENDMENTS—DISCRETION. The refusal of a trial amendment to the complaint will not be disturbed where no abuse of discretion is shown.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 7, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover a broker's commission. Affirmed.

Garret W. McEnerney, Wm. M. Cannon, James L. Robison, James B. Howe, and C. H. Farrell, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

Crow, J.—This action, which has heretofore been in this court, was commenced by Eugene F. Lawson against Black

¹Reported in 102 Pac. 759.

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Diamond Coal Mining Company, a corporation, to recover a broker's commission for the services of himself and of Bruce Cornwall and Maurice McMicken, his assignors. A statement of the issues may be found in our former opinion. 44 Wash. 26, 86 Pac. 1120. From a judgment entered in favor of the plaintiff for \$66,935, the full amount of his claim and interest, the defendant has appealed.

The records and briefs are voluminous. Forty-six elaborate findings of fact were made by the trial judge, to which the appellant has filed exceptions. The controlling assignments of error are that these findings are not sustained by the evidence. Many of the findings cover points not essential to a determination of the issues, and it would serve no good purpose for us to enter upon a detailed discussion of all the attacks made upon them. As a result of our examination of the record, we conclude that the findings do show each and every fact necessary to sustain the judgment, and that such facts have been proven by competent evidence, which, in substance, shows: That the respondent, Eugene F. Lawson, and his assignors, to whom we will hereafter refer as respondents, were employed to sell appellant's coal mine; that as brokers they rendered valuable services to appellant, with the result that the Pacific Coast Company, afterwards the purchaser, became interested in the property and authorized J. D. Farrell, its representative, to buy the mine for \$1,500,000, the price at which appellant had then authorized its sale by respondents; that about this time one D. O. Mills, a heavy stockholder in the appellant corporation, without respondents' knowledge or consent, took up negotiations in New York city with certain persons and interests with whom J. D. Farrell was in close association, with the result that before respondents could complete a sale, Farrell concluded the mine could be purchased for less than \$1,500,000, which fact he communicated to them; that H. H. Taylor, then president and manager of appellant corporation, after considerable correspondence with D. O. Mills, entered into ne-

gotiations with Farrell, which finally resulted in a sale to the Pacific Coast Company, the respondents' customer, for \$1,100,000; that on April 2, 1904, about the time the terms of this sale were agreed upon, Taylor wrote letters to the respondents advising them that they would have no further interest directly or indirectly in any new negotiations; that the sale was then practically consummated; that at no previous time had Taylor or the appellant given any such notice to respondents or any of them, and that Taylor, as president and manager of the appellant, had theretofore urged them to continue their negotiations with the Pacific Coast Company.

Respondents predicate their first claim to employment upon a letter written on April 10, 1903, by P. B. Cornwall, then appellant's president. Appellant strenuously insists that no competent evidence sufficient to show Cornwall's authority to employ respondents appears in the record. We think his authority was proven. Assuming, however, that it was not, respondents predicate a further claim of employment upon a formal resolution adopted by appellant's board of directors on August 26, 1903. The minute book for that date shows the record of two resolutions. The first one, which authorized a sale without limit of time for \$1,500,000 at five per cent commission, is stricken by red ink lines drawn through it. Immediately following it is a second resolution substantially the same, except that it expressly provides that upon the expiration of sixty (60) days after its date it shall be null and void and without effect. Respondents contended, and the trial court found, that the first resolution was the one actually adopted, but that it was afterwards wrongfully erased, and the second one was substituted therefor without respondents' knowledge or consent, and without action of the board. This finding, which we think is sustained by the evidence, is vigorously assailed by the appellant, its contention being that the only resolution which was actually adopted

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by the board was the second one containing the sixty-day limitation.

Assuming the appellant's contention in this regard to be supported by the preponderance of the evidence, still the record convinces us that the appellant afterwards waived such sixty-day limitation, for the reason that Taylor, its authorized agent, urged respondents to continue their negotiations for a sale of the mine, and induced them to do so. In *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899, the first and second syllabi, which state the substance of the opinion on this point, read as follows:

"Where an agent is empowered to procure a purchaser for real estate within a stipulated time, and is to receive a certain compensation for his services, he will not be entitled to recover such compensation unless he furnishes a purchaser within that time.

"But where the owner or principal has waived the performance of the contract within the time agreed upon, and accepts the services of the agent and recognizes and treats the contract as still in force, the agent will be entitled to compensation."

At the meeting of August 26, 1903, appellant's board of directors, by another resolution without limitation as to time, appointed Taylor and one Drum, another director, a committee to conduct any and all negotiations with brokers as to the sale of the coal mine, subject to the board's approval. Drum does not appear to have done anything in the premises, but Taylor did. He repeatedly urged the respondents to continue their services, after the expiration of the sixty-day period. He at the time knew that D. O. Mills was engaged in negotiations with eastern parties, being in correspondence with him. He also acted himself by conducting personal negotiations with Farrell. The indisputable fact is that in some manner a sale was effected to the respondents' customer, the Pacific Coast Company, and later ratified by the appellant's board of directors. Taylor had unlimited authority to deal with the brokers, subject only to

the control of appellant's board. He knew the condition of the minutes, and could have avoided any misunderstanding by formally ordering respondents to cease their efforts. When he reported the sale to the board, he must be presumed to have reported all his acts, including his dealings with the respondents. If he failed to do so, respondents should not be losers by reason thereof. Under the circumstances shown, his knowledge must be considered the knowledge of the board, and when it closed the deal, having such knowledge, it ratified his acts. It could not accept the benefits of the sale for the consummation of which respondents had labored at Taylor's request, and at the same time refuse to compensate them for their services. After the sale had been practically agreed upon, it was too late for Taylor to relieve appellant from liability to respondents by writing his letter of April 2, 1904. Conceding that the respondents' time for making the sale had then expired, under the alleged sixty-day resolution, yet under the facts and circumstances shown by the records, they are entitled to recover.

In *Chilton v. Butler*, 1 E. D. Smith (N. Y.) 150, the court said:

"If vendors were permitted to employ brokers to look up purchasers, and call the attention of buyers to the property which they desired to sell, limiting them as to terms of sale, and then, while such purchasers were negotiating, take the matter into their own hands, avail themselves of the labor, services and expenses of the broker in bringing the property into market, and accomplish a sale by an abatement in the price, and yet refuse to pay the broker anything, the business of a broker would not be worth pursuing; gross injustice would be done; every unfair and illiberal vendor would limit his property at a price slightly above the market, and make use of the broker to bring it into notice, and then make his own terms with the buyers, who were in reality procured by the efforts of the agent."

This language, which has since been quoted with approval by Grant, J., in *Heaton v. Edwards*, 90 Mich. 500, 51 N. W. 544, and by Sharswood, J., in *Keys v. Johnson*, 68 Pa. St.

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42, we regard as especially pertinent to the facts and circumstances of this case.

Appellant assails the amount of the commission or compensation awarded the respondents. The trial court allowed five per cent on \$1,100,000, the selling price, with interest thereon from the date of sale. The record shows that at all times the contemplated commission was fixed on a five per cent basis. It is not disputed that the appellant actually agreed to pay five per cent on \$1,500,000, in the event of a sale at that price. When it afterwards voluntarily reduced the selling price, the respondents were entitled to a ratable commission on such reduced price. In *Martin v. Silliman*, 53 N. Y. 615, the second syllabus reads as follows:

“Where a broker, who is employed to sell property at a given price and for an agreed commission, has opened a negotiation with a purchaser, and the principal, without terminating the agency or the negotiation so commenced, takes it into his own hands and concludes a sale for a less sum than the price fixed, the broker is entitled at least to a ratable proportion of the agreed commission.”

Appellant contends that the trial court erred in rejecting its offer in evidence of certain minutes of the proceedings of its board of directors. These offers were made to negative the respondents' contention that P. B. Cornwall, then president, had authority to act for appellant without the formality of a resolution of its board of directors, when he wrote the letter of employment on April 10, 1903, and that he transacted business generally for appellant without formal authority from its board. The minutes offered and rejected have been read into the record, and are now before us for consideration, if competent. We fail to see that any prejudicial error was committed by their exclusion, for without regard then to his authority, we have found, from other competent evidence, that an authorized employment of the respondents was subsequently made.

This action was commenced August 2, 1904, and was called for trial on November 18, 1907, at which time the appellant,

being a California corporation, asked permission to amend its answer and plead certain statutes of that state. It now contends that the trial court erred in refusing the amendment. It was within the discretion of the trial judge to allow or refuse the amendment at that time, and no abuse of such discretion has been shown. We find no prejudicial error in the record. The judgment is affirmed.

ALL CONCUR.

[No. 7850. Decided June 22, 1909.]

B. C. SECORD *et al.*, Respondents, v. WHEELER GOLD MINING COMPANY *et al.*, Appellants.¹

CORPORATIONS—RECEIVERS—INSOLVENCY—EVIDENCE. In an application for the appointment of a receiver, a corporation is conclusively shown to be solvent where it appears that its mines had cost \$40,000 and were worth \$50,000 and were producing seven tons of ore per day at a net profit of \$4 per ton, and the total indebtedness of the company was about \$4,000.

SAME—RECEIVERS—MISMANAGEMENT—NECESSITY—EVIDENCE—SUFFICIENCY. Mismanagement of a corporation, entitling stockholders to the appointment of a receiver, is not shown by the fact that a director was allowed a salary as manager (the by-laws only prohibiting the payment of compensation to directors as such), that his traveling expenses were allowed, that for convenience the books were removed to another state where all the property was located, that a small *bona fide* debt to the wife of the president was not shown in all the semi-annual statements (it appearing on the books), or that stockholders inquiring at the main office were not furnished all the information desired; since absolute necessity must be shown by clear evidence, and mere carelessness, mistakes or bad policy honestly pursued is not sufficient.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 27, 1908, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action by minority stockholders of a corporation for the appointment of a receiver. Reversed.

¹Reported in 102 Pac. 654.

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Opinion Per MOUNT, J.

Happy & Hindman, for appellants.*Samuel R. Stern*, for respondents.

MOUNT, J.—Respondents brought this action as minority stockholders in the appellant corporation, alleging the insolvency of the corporation, and, also, that the trustees named as defendants have been guilty of negligence and mismanagement of the affairs of the corporation; and prayed for the appointment of a receiver thereof to take charge of the books, accounts, and property of the corporation. The appellants answered, denying all the allegations of the complaint relative to negligence, mismanagement, and insolvency. The cause was tried to the court and, at the conclusion of the trial, a receiver was appointed as prayed for. No findings of fact were made. The appeal is prosecuted from the judgment appointing a receiver.

We have examined the evidence in the case and are satisfied that there is no good reason for the appointment of a receiver, and that the court abused its discretion therein. The appellant Wheeler Gold Mining Company is a Washington corporation, with its principal office in Spokane. It owns certain mines in the state of California. All its business, except the annual meetings of the stockholders, is conducted in California. The office of the secretary and the books and papers of the corporation had been kept in San Francisco for about a year prior to the commencement of the action. In short, all the property of the corporation is located in California, except that the secretary's books were brought to Spokane for the regular annual meeting of the stockholders, about the time this action was begun. The evidence conclusively shows that, at the time of the trial, the mines, together with the development work and machinery thereon, had cost the company more than \$40,000. These mines were estimated to be worth at least \$50,000, and at that time the mines were being operated and were producing between six and seven tons of ore per day at a net profit of \$4 per ton.

The total indebtedness of the company was about \$4,000. The creditors were not making any complaint. These facts show conclusively that the corporation is solvent. In fact, there is no evidence in the record to the contrary.

In regard to mismanagement and negligence of the officers, the proof shows that the president, Mr. Jacobs, was one of the three trustees. He was the active head of the company and the manager of the work at the mines. In December, 1907, he notified the other two trustees that he would expect a salary of \$100 per month after January 1, 1908, as manager of the mines. This was approved by the other two trustees. The by-laws provide that:

"The members of the board of trustees shall receive no compensation for their services as such; nor shall the company pay for any services rendered except as so expressly provided."

The evidence also shows that Mr. Jacobs made two trips from San Francisco to Spokane to attend stockholders' meetings of the company, and credited his account with \$250 for expenses of such trips. It was also shown that the secretary's office and the books and papers were removed from Spokane, Washington, the main office of the company, to San Francisco, California, by order of the trustees, for the convenience of the company's business; and it is shown that the company is indebted to Mrs. Jacobs, the wife of the president of the company, in the sum of \$3,680, which indebtedness was not shown on all of the semi-annual statements issued by the secretary, and the fact of this indebtedness was not known to the stockholders. But the evidence shows that this is a *bona fide* debt. It is shown that certain stockholders, upon inquiring at the main office, were not furnished with all the information they desired, and did not obtain copies of the by-laws when demanded. We are satisfied that none of these things above mentioned constitute mismanagement sufficient to justify the appointment of a receiver of a solvent corporation.

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It is not clear that the president of the company, when acting as manager of the mines, is not entitled to a salary and expenses, especially when the board of directors authorizes the payment thereof. The by-laws are certainly capable of that construction. The books and papers were removed to San Francisco in good faith, by the trustees, for the purpose of facilitating the business of the company, and not for the purpose of fraudulently putting them out of this jurisdiction, or of preventing local stockholders from examining them. The debt owing to Mrs. Jacobs seems to be a *bona fide* debt, and seems also to have been regularly carried upon the books where the status of the debt is shown; and the fact that this item was not shown by the reports, while this may have been an indication of carelessness, was not sufficient to show that a receiver was necessary for the company. The same is, of course, true with relation to the demand for copies of the by-laws.

But, assuming for the purposes of this case that all the things above stated were wrong and beyond the authority of the directors, who were careless and guilty of mismanagement therein, still, under the well-settled rules of law, the court would not be authorized to appoint a receiver of the corporation. The rule is clearly stated in Alderson on Receivers, beginning at page 490, as follows:

"Before a court will take charge of a corporation and thus displace its chosen directors and managers, it ought to have the clearest evidence of the absolute necessity for such extraordinary caution for the protection of the creditors, stockholders and all parties concerned. The power to wrest the property of a corporation from the management of the directors and officers should never be doubtfully exercised. The power of appointing a receiver is a discretionary one to be exercised with great circumspection and only in cases where there is fraud, spoliation, or imminent danger of the loss of the property if the immediate possession should not be taken by the court; and such facts must be clearly proved. The policy of the law is to leave the affairs of corporate

bodies to the management and control of their own chosen agents and a minority of stockholders will not be permitted to displace corporate authority and control of the courts, except in plain cases of such fraud or maladministration as works manifest oppression or wrong to them. The necessity of and right to the appointment of a receiver must be free from reasonable doubt to justify the court in granting the application. So long as the directors keep within the scope of their powers and act in good faith and with honest motives, their acts are not subject to judicial control or revision. And where the controversy is a question of mere discretion in the management of the corporate business, or of doubt in accomplishing the purpose for which the corporation was organized, the remedy by appointment of a receiver will be denied. It is the rule that courts of equity will not, at the suit of a stockholder, resort to the extreme remedy of taking the property out of the hands of the managers elected by the stockholders, except as a last resort, and when considered to be absolutely necessary for the preservation of the trust fund. . . . The appointment of a receiver of a solvent corporation on the application of a minority of the stockholders is a very drastic remedy, which could be justified only in a very strong case. . . . Another matter to be considered in proceedings by stockholders for the appointment of a receiver of the corporation is the requirement of the law that they should have first made every reasonable effort to secure redress and prevention of the threatened mischief within the company itself. Until it is shown that every reasonable effort to obtain redress through the regularly constituted agents and controlling power of the corporation has proved unavailing, a stockholder cannot sue in his own name alone, nor on behalf of himself and other stockholders for the appointment of a receiver."

And in 23 Am. & Eng. Ency. Law (2d ed.), p. 1023, the rule is stated as follows:

"The subject of the appointment of a receiver for a corporation on the ground of misconduct of officers or directors has given rise to much apparent conflict in the cases. But however much the decisions seem to differ on the particular facts, the rule generally recognized is that a corporation will be placed in the hands of a receiver for the misconduct of its

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officers or directors only when necessary to preserve the property or rights of creditors or stockholders. The mere misconduct of officers of a corporation is not sufficient ground for the appointment of a receiver, as a court of equity may forbid the misconduct or remove the officer from his position."

The cases cited by respondents are not in point in this case. The case of *Cameron v. Groveland Imp. Co.*, 20 Wash. 169, 54 Pac. 1128, 72 Am. St. 26, is a case where the officers were guilty of fraud and "that by reason of such fraud the corporation was in imminent danger of insolvency . . . and that plaintiffs had no relief except in equity." The case of *New York Nat. Exchange Bank v. Metropolitan Sav. Bank*, 28 Wash. 553, 68 Pac. 905, was one where the corporation was confessed to be insolvent, and was dissolved. No such facts as existed in the two cases above cited are presented in this case. The corporation here is neither insolvent nor in imminent danger of insolvency, nor is there any likelihood of the property of the corporation being lost to the stockholders or creditors, through fraud or collusion of its officers, or through mismanagement or waste. It is apparent from the complaint and the proof in the case that a minority of the stockholders were dissatisfied with the management of the corporation by the majority stockholders, by reason of certain assessments on the capital stock of the company; and inasmuch as an election of trustees was about to take place and the control of the corporation would evidently remain with the old board, this action was instituted for the appointment of a receiver. As stated above, the policy of the corporation, if honestly conducted, must be controlled by the majority of the stockholders. Mistakes, inadvertence, or bad policy, if honestly pursued, will not warrant the appointment of a receiver. Courts will not interfere except in case of fraud or the infringement of legal acts which cannot be otherwise redressed.

We find no justification for the appointment of a receiver

in this case. The order is therefore reversed, with directions to the lower court to dismiss the action.

RUDKIN, C. J., DUNBAR, CROW, FULLERTON, GOSE, and CHADWICK, JJ., concur.

[No. 7862. Department One. June 22, 1909.]

JOHN WESTERLUND, *Respondent*, v. HENRY ROTHSCHILD
et al., *Appellants*.¹

MASTER AND SERVANT—SAFE PLACE—DELEGATION OF DUTY—SIGNALMAN—FELLOW SERVANTS. Where a stevedore, stowing piles in the hold of a ship, was injured through the premature starting of the cable, the master's duty to control the cable affects the safety of the place, and cannot be delegated to a fellow servant; and the negligence of a signalman in giving the wrong signal is that of a vice principal.

SAME—VICE PRINCIPALS—EVIDENCE OF COMPETENCY—MATERIALITY. Where plaintiff was injured through the negligence of a vice principal in performing a nondelegable duty, evidence as to general competency is properly excluded as immaterial.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 1, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Trumbull & Trumbull, for appellants.

Israel Nelson and Robert C. Saunders, for respondent.

MORRIS, J.—Appellants are stevedores and employed respondent, with several others, in loading a vessel with piling. The pile was lifted by a cable with attached hooks, and placed in the hold of the ship, where it was respondent's work to place it in proper position and, when so placed, to detach the hooks. When the hooks were released and plaintiff had assumed a position of safety, a signal would be given by one

¹Reported in 102 Pac. 765.

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called a side-runner, to a signalman, who in turn signaled to the engineer in charge of the engine, which was outside of the ship and on a scow, neither it nor the engineer being within sight or hearing of respondent; the cable carrying the piling running from a scow upon which the piles were loaded, up through a porthole, and then down into the hold of the ship. While plaintiff was bending over a pile, in the act of detaching the hooks, the engine suddenly started the cable, jerking the pile up to the deck and carrying plaintiff along with it, catching him between the pile and the deck, and inflicting the injuries complained of. The negligence alleged was in the movement of the cable while plaintiff was in a position of danger. The defense was negligence of fellow servants. Trial being had, a verdict was returned for plaintiff, and upon entry of judgment, defendants appeal.

The errors complained of are many, but they principally relate to appellants' contention that the injury was caused through the negligence of fellow servants, in the various ways in which appellants presented the question to the court.

It was the duty of appellants to furnish respondent with a reasonably safe place in which to work, and to keep that place reasonably safe during the progress of the work. This duty was not confined alone to the place where respondent performed his work, but was extended to all the instrumentalities, machinery, and appliances which from the nature of the work directly affected the safety of the place. Such, then, being the duty of the appellants, failure to properly control the movement of the cable, by giving wrong signals or acting without signals, while respondent was in a position of danger, was negligence, irrespective of the men or means employed for that purpose. Being a duty imposed by law upon the appellants, such duty could not be delegated to others, whether coemployees of respondent or not, so as to relieve appellants from liability for their failure to properly perform this duty. *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334. The person selected by appel-

lants to give the signals controlling the proper movement of the cable was, in giving such signal, performing the appellants' duty, and his negligence, if any, was the negligence of appellants. *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313. The doctrine of the above cases has been so frequently announced by this court that it would seem to be no longer an open question in this state, and the citation of concurring cases, without further review, is sufficient. *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Comrade v. Atlas Lumber & Shingle Co.*, 44 Wash. 470, 87 Pac. 517; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326; *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645, 90 Pac. 1046.

The evidence is not clear as to whether the signalman gave the wrong signal to the engineer, or whether the engineer started the engine without a signal. Each of these men seeks to exonerate himself by saying, the one that he gave the proper signal; the other that he started the engine only upon, and when directed by, proper signal from the signalman. But there was sufficient evidence to justify the verdict upon the belief that the wrong signal was given. This seems to be the contention here, appellants contending that the signalman was a fellow servant, while respondent contends the case falls within the rule announced in the above cited cases.

Complaint is also made of certain instructions. What has been previously said disposes of the questions thus raised. The instructions properly stated the law applicable to the case, and we find no error in them.

Error is predicated upon the court's refusal to permit appellants to show that the men working with respondent had been in their employ for some time and were competent and careful men. We find no error in this ruling. The general character of the men in this respect was not an issue. The

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Statement of Case.

only question properly in the case upon this feature was to determine whether there was negligence causing respondent's injury for which his employers were answerable; and, if so, it was immaterial that this negligence was that of men generally prudent, careful, and competent to do the work assigned them.

The judgment is affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and CHADWICK, JJ.,
concur.

[No. 7829. Department One. June 22, 1909.]

ARROW LUMBER AND SHINGLE COMPANY, *Appellant*, v. UNION
PACIFIC RAILROAD COMPANY, *Respondent*.¹

RAILROADS—SERVICE OF PROCESS—AGENTS. The fact that a soliciting agent was advertised as the "General Agent" of defendant railway company does not authorize the service of process upon him, under Bal. Code, § 4875, subd. 4, authorizing service upon any agent, where he derived no actual authority from the defendant, which had no interest in his office, and his reports were made to, and his salary was paid by, other companies.

CORPORATIONS—FOREIGN—SERVICE OF PROCESS—DOING BUSINESS IN THIS STATE. The routing, by a soliciting agent, of freight and passenger business over the line of a foreign railway does not make him an agent of the company upon whom service of process may be made; and when contracts are made therefor as the contracts of other companies, which arranged the division of the transportation, the transaction does not amount to "doing business in this state" by the foreign connecting lines.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 14, 1908, granting defendant's motion to quash service of summons upon a foreign corporation, after a hearing before the court, in an action for damages. Affirmed.

¹Reported in 102 Pac. 650.

Douglas, Lane & Douglas, for appellant.

W. W. Cotton, Arthur C. Spencer, and John P. Hartman,
for respondent.

MORRIS, J.—The plaintiff below brought this action to recover damages for the improper storage of lumber, at Lincoln, Nebraska. Service was made upon E. E. Ellis, at Seattle. The defendant moved to quash the service, upon the grounds (1) that the summons was not served upon any agent of the defendant company within the state of Washington; (2) that Ellis was not an agent of defendant; (3) that defendant was a foreign corporation, not doing business within the state of Washington, nor had it complied with the laws of this state governing foreign corporations doing business within this state. Issue being joined upon this motion, a large number of affidavits were presented to the court, resulting in the sustaining of the motion, from which ruling plaintiff appeals.

The salient facts shown by the affidavits are, that Ellis is in charge of an office at Seattle from which advertising matter of the respondent is distributed, and freight and passenger business solicited. Upon the door of this office is the following, "Union Ticket Office, E. E. Ellis, Gen. Agt.," and upon the window appears the advertising design of the respondent, a shield in red, white and blue, with the words "Union Pacific, the Overland Route." Underneath this shield appears the following: "Oregon Railroad & Navigation Co.; Oregon Short Line R. R.; Union Pacific R. R.; Southern Pacific Co."; and below are the words, "Freight and Ticket Office." Ellis also uses stationery bearing the names of the above companies, with "E. E. Ellis, General Agent," printed thereon.

Several officers of the above-named railway companies made affidavits showing, that Ellis was the agent of the Oregon Railroad & Navigation Company and Southern Pacific Company; that respondent company had no interest in the Se-

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attle office or any control over it; that Ellis' salary was paid in whole by the Oregon Railroad & Navigation Company and Southern Pacific; that all freight contracts and tickets were issued by the Oregon Railroad & Navigation Company or Southern Pacific; that no contracts were made on behalf of respondent company; that the tickets sold contained coupons reading over any road east and frequently over the Union Pacific, but that all money collected for tickets was remitted to either the Oregon Railroad & Navigation Company or the Southern Pacific; that respondent was a Utah corporation, neither owning nor operating any railway line within the state of Washington; that Ellis quoted freight and passenger rates and routings over respondent's line as well as other lines connecting with the Oregon Railroad & Navigation Company and the Southern Pacific.

The statute under which the service was made is as follows:

"The summons shall be served by delivering a copy thereof . . .

"(4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state; . . .

"(9) If the suit be against a foreign corporation or non-resident joint stock company or association doing business within this state, to any agent, cashier, or secretary thereof; . . ." Bal. Code, § 4875 (P. C. § 332).

A like question was determined by this court in *Rich v. Chicago etc. R. Co.*, 34 Wash. 14, 74 Pac. 1008. That case is determinative of this, and we care to add but little to what was there said. The mere fact that Ellis was known and advertised as "General Agent" of the respondent is of no value to appellant, since it is clear from all the authorities that it is the actual relation of the parties that is controlling, and not the official designation or title which the alleged agent may assume. The person upon whom the service is made must be an agent who represents, and derives his authority from, the corporation defendant, and the authority thus conferred and exercised must be an actual authority, and not one created by implication. The fact that Ellis solicited freight

and passenger business, routing this business over the respondent's line, as he did over all other lines connecting with the Oregon Railroad & Navigation Company and the Southern Pacific Company, does not make him an agent of the company over whose line such freight may be carried or such passengers travel; since it appears that all such contracts are issued as the contract of one or the other of the companies last named to whom he alone reports, and that they in turn arrange the division of the transportation with the connecting lines upon an agreed basis. Such an arrangement does not constitute a "doing business within this state," nor does it clothe Ellis with any cloak of agency within the meaning of our statute.

In view of the *Rich* case, we do not care to extend this opinion other than to say that, since the announcement of the rule in that case, the supreme court of the United States, in two cases, has announced a like rule. *Peterson v. Chicago etc. R. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; *Green v. Chicago etc. R. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916. Upon the facts, the *Peterson* case is much stronger in favor of appellant's contention than the case before us, from the fact that two of the parties served were employees of the company sought to be held.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ.,
concur.

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[No. 7907. Department One. June 22, 1909.]

GEORGE PEYSER, *Respondent*, v. WESTERN DRY GOODS
COMPANY, *Appellant*.¹

APPEAL—REVIEW—TRIAL—AMENDMENT OF PLEADINGS. Where evidence is admitted without objection as to matters outside the issues, and the defendant was not misled and asked no continuance, the complaint will be deemed amended on appeal to embrace the matters in proof.

CUSTOM AND USAGE—EVIDENCE—TO PROVE CONTRACT—ADMISSIBILITY. Where a broker's commission was agreed upon, but there was a dispute as to whether the contract provided for payment of the commission on sales made by others in the agent's territory, evidence of the general custom as to commissions usually paid is inadmissible.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error cannot be assigned on the judge's comment on the evidence, where the remarks were addressed to counsel during the trial and no exceptions were taken.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 10, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover an agent's commission. Affirmed.

Anderson & Servis and *Roberts & Hulbert*, for appellant.

E. P. Dole and *J. E. McGrew*, for respondent.

Gose, J.—The respondent, a traveling salesman, the plaintiff below, instituted this suit to recover the balance due him as commission on sales which he claimed to have made for the appellant. This case was here on a former appeal. See 48 Wash. 55, 92 Pac. 886, for a fuller statement of the issues. In this trial, as well as in the former one, there was a verdict and judgment for the plaintiff. The defendant has appealed from such judgment.

The single question at issue in this trial was whether the respondent was entitled to a commission on the sum of \$5,-

¹Reported in 102 Pac. 750.

057.99, the value of the goods sold in his territory, which sales he did not make. At the beginning of the trial, the parties stipulated that goods of the value of \$25,944.30 were sold in respondent's territory while he was in the employ of the appellant. The respondent insisted at the trial that he was entitled to a commission on that sum. The appellant contended that the respondent was entitled to a commission on that amount, less \$5,057.99. During the progress of the trial, certain correspondence between the parties was admitted in evidence. Later, the respondent testified without objection that there was a subsequent oral contract between the parties, whereby he was to be paid a fixed commission on all goods sold in his territory without regard to who made the sales. The court instructed the jury as follows:

"Under the evidence of the case, gentlemen, and the admissions of the parties, in the opinion of the court, the only controversy for you to determine is the question of fact, whether or not after the acceptance of this written proposition of the defendant by the plaintiff there was an oral supplemental agreement between the parties whereby the plaintiff was to receive a commission not only upon the sales made by himself but upon the sales made by the defendant within his territory. This is the only fact for you to determine."

The appellant assigns error upon the giving of this instruction, and urges that the respondent's recovery should have been limited to a commission on all goods sold by him, as alleged in the complaint. The respondent could have amended his complaint so as to include the disputed items. Evidence having been admitted without objection, the complaint will be treated as having been amended so as to conform to the evidence. Bal. Code, §§ 4957, 6535 (P. C. §§ 428, 1083); *Peterson v. Barry*, 50 Wash. 361, 97 Pac. 239; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Spokane Valley Land & Water Co. v. Jones & Co.*, ante p. 37, 101 Pac. 515. The appellant does not appear to have been misled. Not having objected to the introduction of the evidence

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and having made no application for a continuance, he will not now be heard to complain. The appellant's manager, with whom the respondent testified he made the oral contract, was offered as a witness on behalf of the appellant, and testified that the respondent's commission was limited to sales which were made by the respondent. There was no other evidence as to the right of the respondent to have a commission on sales made in his territory but which he did not make.

The appellant sought to introduce evidence of a general custom among wholesale houses as to the commission paid in cases of this character. The court excluded the testimony. This is assigned as error. In support of this assignment, the appellant cites *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548; *Adamant Plaster Mfg. Co. v. National Bank of Commerce*, 5 Wash. 232, 31 Pac. 635, and *Wheeler v. Buck & Co.*, 23 Wash. 679, 63 Pac. 566. In the *Noyes* case, the court, speaking to the admissibility of such evidence, say:

"Where no rate of compensation has been agreed upon, or where there is a conflict of evidence as to whether there was a rate agreed on or not, such testimony is competent."

In the *Adamant Plaster Co.* case, the court announced the familiar general rule that, where the contract is ambiguous, evidence of custom is admissible to explain the ambiguity. In the *Wheeler* case, the plaintiff asserted that, under the contract, he was to receive a fixed commission on sales, whilst the defendant contended that there was no agreement to pay any commission other than a reasonable one. The defendant sought to prove the profit it had in the sales. The trial court rejected the testimony. This court held that the evidence was admissible. These cases do not apply, for the reasons hereafter shown.

The rule is settled, in this state at least, that the evidence offered was not admissible. In *Swadling v. Barneson*, 21 Wash. 699, 59 Pac. 506, the question to be determined was when the plaintiff's commission became payable. The plaintiff contended that it became due when he procured a cus-

tomer for the defendant, whilst the defendant claimed there was no commission due until he had been paid for the business by the plaintiff's customer. The defendant sought to prove the "custom prevailing among commission men." At pages 703 to 704, the court said:

"Certainly, if this had been the real contract, the defendants could not have been bound by any custom in relation to the payment of marine commissions, if the custom proven had been to the effect that the commission was due when the contract was entered into. Neither could the plaintiff be bound by any custom shown which was in opposition to his alleged contract, so that the custom, if any existed, was absolutely immaterial, under the theories announced by both the plaintiff and the defendants in their respective pleading."

In *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534, the plaintiff had sold certain cattle to the defendant. The issue was whether the point of delivery agreed upon was London or Montesano. The cattle were placed on a scow at London, to be carried to Montesano. The scow was capsized and the cattle lost. The plaintiff asserted that the agreed place of delivery was London, while defendant claimed that they were to be weighed and delivered at Montesano. At the instance of the defendant, testimony was admitted tending to show a custom among cattle dealers that, where cattle were sold to be weighed at Montesano, the title did not pass until the cattle had been weighed. At page 405 the court say:

"It is only where a contract is silent in some particular or is ambiguous that proof of custom is admissible, and such proof is then admissible only for the purpose of finding out what the contract really was, and not to overthrow it. Proof of custom is received in such cases upon the assumption that, as to those matters not covered by express stipulations in the agreement, the parties are presumed to have made their contract with reference to the established custom and usage of that place; and these the law will incorporate into the contract, in order to explain or complete it. But it is always within the power of the parties to exclude custom from their

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dealings by their express agreement, as was done in this case."

It will be observed that this court has uniformly distinguished between cases where the terms of the contract have been agreed upon and those where the terms of the contract have not been agreed upon. It has also distinguished, in cases where the terms have been agreed upon, between custom as evidence of value and other evidence tending to show the value of the subject-matter of the contract. Stated in another form, it has held that, when there is a contract but a dispute as to the contract price, evidence of the value of the subject-matter of the controversy is admissible as a circumstance tending to prove or disprove the matter in dispute, whilst evidence of custom cannot be admitted for such purpose. It is conceded in this case that the commission was agreed upon, but there is a controversy as to what the agreement was. The writer is not convinced of the soundness of this distinction. If it were an original question in this court, he would be inclined to regard proof of a general custom as a circumstance tending to corroborate the appellant's version of the contract. However, being largely a rule of procedure, we will adhere to the rule we have heretofore announced.

It is finally urged that the court committed error in commenting on the evidence. The remarks of the court were addressed to counsel, during the progress of the trial, and no exceptions were taken or objections made. The court instructed the jury that they were the exclusive judges of all questions of fact. The assignment is therefore without merit.

Finding no error in the record, the judgment will be affirmed, and the respondent will recover his costs.

RUDKIN, C. J., FULLERTON, MORRIS, and CHADWICK, JJ.,
concur.

[No. 8020. Department One. June 22, 1909.]

GEORGE H. MEAD *et al.*, *Appellants*, v. S. A. WHITE *et al.*,
Respondents.¹

FRAUDS, STATUTE OF—DEBT OF ANOTHER—COLLATERAL OR ORIGINAL PROMISE. Where a building contract recited that it is between, and it was signed by, the contractor, as party of the first part, and the owner as party of the second part, the obligation of alleged sureties also signing the contract is a collateral and not an original undertaking, and is within the statute of frauds.

SAME—MEMORANDUM. The contract of persons who sign "as sureties," at the foot of a written building contract between the contractor and the owner, is not in writing, and is void as within the statute of frauds, where the writing contains no provision connecting the sureties with it or showing their relation to the parties.

SAME—VOID CONTRACT—REFORMATION. A contract, void within the statute of frauds, cannot be reformed upon parol evidence.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 2, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

E. L. Culver and *B. A. Crowl*, for appellants.

H. G. & Dix H. Rowland, for respondents.

GOSE, J.—The appellants commenced this action for the purpose of reforming a written contract, and recovering a judgment thereon against the defendant and the respondents for its breach. The introductory part of the contract is as follows:

"BUILDING CONTRACT.

"This agreement made and entered into this 25th day of March, 1907, by and between J. R. Winslow, party of the first part, hereinafter designated the contractor, and George H. Mead and Helen M. Mead, party of the second part, hereafter designated the owner.

"Witnesseth: That the contractor, in consideration of the

¹Reported in 102 Pac. 753.

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agreements herein made by the owner, agrees with said owner as follows"

The contract, which is quite lengthy, then provides what shall be done by the contractor and the owner respectively. The attestation clause and the subscription are as follows:

"In witness whereof the parties of these presents have hereunto set their hands the day and year first above written.

"In presence of sureties

J. R. Winslow.

"S. A. White.

George H. Mead.

"W. F. Bailey.

H. M. Mead."

The words "in presence of" are printed, and the word "sureties" was written before the contract was signed. The complaint charges that the respondents "subscribed as sureties for the faithful performance of such contract on the part of J. R. Winslow," and prays that the contract be reformed as to the respondents so as to read: "Subscribed as sureties for the faithful performance of said contract on the part of J. R. Winslow," and for judgment against the defendant and the respondents. The case was tried to the court, resulting in a judgment for the respondents. From such judgment, this appeal is prosecuted.

The answer, among other things, pleads that the contract is void under the provisions of Bal. Code, § 4576 (P. C. § 5343), which provides:

"In the following cases specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say:—

"(2) Every special promise to answer for the debt, default, or misdoings of another person;"

The contract does not show the relation of the respondents to it, other than such as may be gathered from their signatures. Upon reading the contract the mind at once inquires, for whom and for what purpose did the respondents sign. The contract may be searched in vain for an answer to this

inquiry. It contains many requirements upon the part of the contractor and the owner, but is silent as to any duty or obligation as to the respondents. The discussion takes broad ground in the briefs, but the view we take of the case narrows the scope of inquiry.

The appellants contend, first, that the contract of the respondents is an original undertaking rather than a collateral one, and as such that it is not within the statute. We will first notice this contention. When the object of the undertaking is to become surety for another, the promise is collateral and must be in writing. 20 Cyc. 163. In *Nugent v. Wolfe*, 111 Pa. St. 471, 480, 4 Atl. 15, 56 Am. Rep. 291, speaking to the question of the distinction between an original and a collateral promise, the court say:

"It is difficult, if not impossible, to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute."

"Courts must rely on the circumstances of each particular case, and its general features in order to ascertain the intent of the parties, and how they viewed it when it is doubtful whether it was a contract of suretyship or guaranty or an original undertaking. Generally speaking an oral undertaking by a person not previously liable, for the purpose of securing the debt or performing the same duty for which the person for whom the undertaking is made remains liable, is within the statute of frauds and must be in writing." 20 Cyc. 164.

Upon both principle and authority, we have no difficulty in reaching the conclusion that the undertaking of the re-

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spondents was a collateral one. The contract, therefore, must be in writing, notwithstanding the fact that all the parties entered into it at the same time. Stearns on Suretyship, p. 42.

We will next consider whether the contract as it affects the respondents is in writing within the meaning of the statute. In *Foot v. Robbins*, 50 Wash. 277, 97 Pac. 103, the court had under consideration a contract whereby the owner employed a broker to sell real estate. The terms and conditions of sale were complete, but the contract was silent as to the broker's compensation for his services. At pages 279-80, the court said:

"If by the written agreement the payment of a commission by respondents was contemplated, resort must now be had to oral evidence for the purpose of showing the amount of such commission, and that it was to be paid by the appellant as vendor and not by the purchaser as vendee. The unmistakable purpose of the statute was to avoid any such method of fixing the extent of the liability, or the liability itself, of either a vendor or a vendee for the payment of a commission."

In *Allen v. Kitchen* (Idaho), 100 Pac. 1052, a well-considered case, the court, speaking through Ailshie, Judge, at page 1056, say:

"There is no contract until it is reduced to writing as provided by law. It is not a question as to what the contract was intended to be, but rather, was it consummated by being reduced to writing as prescribed by the statute of frauds. Admittedly an essential portion of the contract in this case was not reduced to writing and subscribed by the party to be bound. This case, therefore, presents the question of adding to and supplying an insufficient description, rather than that of reforming an untruthful description. If a court of equity can supply one requirement of a contract that is required by the statute of frauds to be in writing, it may supply another, and the logical conclusion would be that it might in the end supply all the requirements, and thereby contravene a positive statute. This cannot be done."

"In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them. Accordingly, if an oral contract falling within the scope of the statute has terms not stated in the memorandum, or if the memorandum contains a reference to such terms or imports their existence by fair inference without clearly stating them, or if the memorandum merely refers to the contract without stating its terms, the case falls within the statute." 20 Cyc. 258-9-60.

See, also, *Board of Comrs. Marion County v. Shipley*, 77 Ind. 553; *Lee v. Hills*, 66 Ind. 474; *Grant v. Naylor*, 4 Cranch 224, 2 L. Ed. 603.

The document, aside from the word "sureties" and the signatures of the respondents, states a complete contract between the appellants and the defendants, but contains no provision which even tends to connect the respondents with it. As between the appellants and the respondents, there is an entire absence of contract. In order to hold the respondents to any liability, the court would be required to create a contract, either by construction or by parol evidence. There is no language in the contract to warrant the former, and the latter is within the prohibition of the statute. Surely the mere subscription of the contract by the respondents under the word "sureties," without showing their relation to the contract or to the parties, cannot be said to create any contract relation. A cursory examination of the record in this case affords abundant evidence, if evidence were wanting, of the wisdom of the statute. One of the respondents testified that he only engaged to guarantee the integrity of the defendant, while the other said that he signed merely for the purpose of recommending him.

Finally, it is contended that a court of equity has power to reform the contract and to enforce it when so reformed. The contract being invalid under the statute, parol evidence will

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not be admitted for the purpose of reforming it. To do so would result in permitting the parties to accomplish indirectly that which the statute forbids. Speaking to this question in *Allen v. Kitchen*, *supra*, at page 1057, it is said:

"After a very careful examination of the many authorities dealing with this question, we are clearly of the opinion that courts of equity have power and jurisdiction to so reform an executory contract that is valid and binding on its face as to relieve it of any statement, declaration, or description that has been inserted therein through deception, fraud, or mutual mistake, and to make the statements speak the truth as it was intended to insert them in the instrument. On the other hand, we are equally satisfied that a court of equity has no power or jurisdiction to construct an executory agreement for the parties, or to insert therein new and essential elements, or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding. In other words, reformation does not mean re-creation. The court will not, under the guise of reforming an instrument construct or reconstruct the instrument, so as to make it comply with the statute."

See, also, *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418. The record does not present the question of reforming a contract so as to speak the truth, but rather of creating a contract in its entirety.

What we have said renders it unnecessary to consider the other assignments. The judgment will be affirmed and the respondents will recover their costs.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

[No. 8115. Department One. June 22, 1909.]

C. L. CHRISTY, *Respondent*, v. FRANK BAIOCCHI *et al.*,
Appellants.¹

VENDOR AND PURCHASER—CONTRACT—FORFEITURE—EXCUSE FOR DEFAULT. An initial payment on a land contract is not forfeited by failure to make a second payment on the date set, when the vendors were out of the state at the time it was due.

SAME—MUTUAL COVENANTS—DEMAND. The provisions of a land contract providing for a second payment at a specified time, and that deed should be given on such payment, are mutual and concurrent, and the vendor cannot declare a forfeiture without demand and tender of a deed.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 13, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for breach of contract. Affirmed.

Blaine, Tucker & Hyland, for appellants.

Martin J. Lund (*Vince H. Faben*, of counsel), for respondent.

RUDKIN, C. J.—On the 20th day of March, 1907, the plaintiff and the defendants entered into a contract whereby the defendants agreed to convey to the plaintiff certain real property therein described for the consideration of \$15,000, to be paid as follows: \$2,000 cash, the receipt of which was acknowledged; \$5,500 on September 20, 1907; and \$7,500 on September 20, 1908, with interest on deferred payments at the rate of 7 per cent per annum until paid. It was further agreed that if the payment of \$5,500 was made on or before September 20, 1907, the purchaser would be let into the immediate possession of the premises, and should execute and deliver to the defendants his promissory note for the sum of \$7,500, with interest at the rate of 7 per cent per annum, payable on or before September 20, 1908, and secured by a pur-

¹Reported in 102 Pac. 752.

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chase money mortgage. It was also agreed that the net rental of the premises should be credited on the purchase price from the date of sale, that time was of the essence of the contract, etc. The complaint alleged, the execution of this contract; that the defendants left the state before September 20, 1907; that the plaintiff made diligent search and was unable to find them or their whereabouts until September 30, 1907; that on the last-mentioned date the plaintiff tendered to the defendants the sum of \$5,500 with interest (less the net rental on the premises from the date of sale), together with a note secured by mortgage in the sum of \$7,500, and demanded a deed; that defendants refused to accept the tender or deliver the deed; that on the 20th day of September, 1907, the premises were of the value of \$20,000, and prayed judgment for the sum of \$7,000.

The answer admitted the execution of the contract, denied the tender, and alleged affirmatively that the defendants elected to declare a forfeiture of the contract, and all payments made thereunder, for failure on the part of the plaintiff to make the payment due September 20, 1907, and so notified the plaintiff. Trial was had before a jury, and from a judgment entered upon a verdict of \$2,000 in favor of the plaintiff, the present appeal is prosecuted.

Inasmuch as both parties claim that the contract was terminated, the appellants by failure to make the payment of \$5,500 due September 20, 1907, and the respondent by the refusal of the appellants to execute a deed on September 30, 1907, we will accept the termination of the contract as an established fact and adjust the rights of the parties on that basis. There is manifestly no foundation for the claim that the initial payment of \$2,000 was forfeited for failure to make the further payment due under the contract on September 20, 1907. In the first place, the appellants were absent from the state when the money became due, so that no tender or demand could be made, and in the second place, the covenant to pay and the covenant to deliver the deed

were mutual and concurrent, and a forfeiture could not be declared without first tendering a deed and demanding the purchase money due. *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Tacoma Water Supply Co. v. Dumermuth*, 51 Wash. 609, 99 Pac. 741, and cases there cited. If the contract was terminated and the \$2,000 paid under its provisions not forfeited, the right of the respondent to recover that sum would seem to follow as a matter of course.

The judgment of the court below is therefore affirmed.

CHADWICK, GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 7963. Department Two. June 25, 1909.]

MARY A. SEYMOUR, *Respondent*, v. ALICE D. DUFUR *et al.*,
Appellants.¹

EJECTMENT—RECORD TITLE—PRESUMPTIONS. The plaintiff in ejectment cannot recover on the strength of a deed from a common grantor, whose prior deed of the same property to one P. was already on record when plaintiff's deed was made, P. having subsequently conveyed the record title to the defendants; and it is not incumbent on the defendants to explain their record title, or allowable for the court to indulge in presumptions to overthrow it.

SAME—TITLE. The plaintiff in ejectment must recover, if at all, on the strength of his own title.

ADVERSE POSSESSION—PAYMENT OF TAXES—SUCCESSIVE PAYMENTS. Under Bal. Code, § 5504, providing for the acquisition of title to vacant and unoccupied land by the payment, under color of title, of all taxes for seven successive years, the taxes must be paid continuously each successive year.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered November 2, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

¹Reported in 102 Pac. 756.

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Opinion Per DUNBAR, J.

John F. Dufur and E. B. Dufur, for appellants.

Willett & Willett and Imus & Stone, for respondent.

DUNBAR, J.—This is an action in ejectment to recover lots 1 to 10, both inclusive, lots 11 and 12, and lots 25 and 26, all in block 91, Parker's Addition to the town of Kalama. The complaint charges that the plaintiff was the owner and lawfully possessed of said property, and that the defendants unlawfully entered into the possession of said premises and ousted the plaintiff, and unlawfully withhold the possession thereof from the plaintiff. The answer denies the right of possession in the plaintiff, and alleges title and possession in the defendants. It also disclaims title to lots 1 to 10 inclusive. The reply denied the affirmative allegations of the answer. Upon these issues the case went to trial before the court. There seems to be no merit in the motion to dismiss.

The facts in this case are few and simple. It is stipulated that John A. Parker, from whom both parties are claiming title, had perfect title in fee simple to all the lots in question at the time of filing the plat. The respondent relied upon the warranty deed from Parker to her, which deed was dated May 25, 1893, acknowledged February 2, 1895, and filed for record February 4, 1895, by John A. Parker, the grantor. To deny her title, appellants offered in evidence a warranty deed from John A. Parker to Frank B. Peterman of said lots 11 and 12. This deed is dated November 21, 1889, acknowledged the same day, and recorded by Peterman November 22, 1889. Appellants also introduced a deed from Frank B. Peterman to Alice D. Dufur, one of the appellants. This deed is dated November 12, 1907, acknowledged the same day, and recorded November 16, 1907. The statement and judgment of the court at the conclusion of the trial is as follows:

"In this case it appears to the court as against defendants, plaintiff is the owner of lots 11, 12, 25 and 26 in block 91, Parker's Addition to Kalama; that defendants are in posses-

sion of said lots, and that plaintiff is entitled to judgment ejecting them therefrom. Lots 25 and 26 may have been added to the original plat either before or after it was filed, but there is not sufficient evidence to establish the fact that it was done after the plat was filed for record. Before the court could accept it the evidence should be clear and convincing. There is on record a deed from Parker to one Peterman, for lots 11 and 12. Subsequently Parker deeded said lots to plaintiff herein. After this case was commenced, a deed appears of record from Peterman to defendant Dufur. The history of this deed to Peterman is unknown to this court. It may have been recorded by mistake and was never delivered. Peterman may have redeeded the property to Parker and the deed wasn't recorded, or the deed may have been a mortgage. The second deed to plaintiff was so shortly after the deed to Peterman, it may not be an unfair presumption that Peterman's title had been re-invested in Parker or Parker wouldn't have re-sold. If he had, Peterman undoubtedly would have instituted an action to quiet his title instead of acquiescing in the deal. The evidence relative to the deed from Peterman since the beginning of this action is too unsatisfactory to be accepted. The transaction is so recent that it should be not only very clear in the mind of the witness establishing it, but his testimony should be convincing. Ordinary precaution would have held Peterman or his deposition taken or good reason shown. His identity was very important in this case. It appears that only a few feet of defendants' house is on lots 25 and 26, and it wouldn't be much trouble for defendants to move their house over. If his house remains in part of Juniper street there will be no injury to plaintiff herein, as it is not an open street, and would be of little value if it was. Until it becomes a nuisance to plaintiff, she should not complain. Judgment will be given plaintiff ejecting defendants from said lots. Said judgment and findings will be signed on the date of Nov. 2, 1908. This will give defendants time to purchase the lots from plaintiff or move his house."

So far as the question of title between Parker's grantee, Peterman, and his subsequent grantee, Mrs. Sheridan (who subsequently became Mrs. Seymour, the respondent in this case), is concerned, it is a question entirely of record, and we

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Opinion Per DUNBAR, J.

think that the suppositions indulged in by the court were unwarranted, and that the conclusion reached was wrong. Here is a deed, fair upon its face, executed with all the forms of law, properly recorded in a record which is notice to all the world of the title of the real estate in that county. There is no evidence whatever to support the supposition of the learned court, and it would work an injustice to innocent purchasers for courts to hold that such a record did not express or show the true condition of the title by reason of the suppositions mentioned by the judge. It is not necessary that the history of the deed to Peterman should be known to the court, excepting as it appears through the record. That is what a record is for, to remove the necessity for oral testimony in relation to the transfer of real estate. It is true it might have been recorded by mistake and never delivered, but that possibility might exist in any transaction, and it is too remote a possibility to base a judgment upon. Nor is it any more reasonable to conclude that Peterman may have redeeded the property to Parker, and that Parker was so negligent that he did not place it of record before he deeded to a subsequent grantor. The burden which the court placed upon the grantees under this deed, it seems to us, the law places upon the grantors, and the grantee has a right to rest upon the record title until transactions are shown outside of the record which destroy such title. If Parker had never deeded these lots to Peterman, or if they had been redeeded as the court seems to think they might have been, it was within the power of the respondent to have shown that condition of facts. In fact, she did give notice that she would have the deposition of Parker taken at a certain time and place, and never did have it taken. While it is true that the circumstances surrounding the execution and delivery of the quitclaim deed from Peterman to Alice D. Dufur are somewhat obscure, yet the deed was of record and was not shown to be fraudulent. In addition, this is an action in ejectment,

and the respondent must recover, if at all, upon the strength of her own title and not upon the weakness of her adversary's.

It is, however, claimed by the respondent that she is entitled to this land by reason of having paid the taxes on the same for seven years. Bal. Code, § 5504 (P. C. § 1161), provides that:

"Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the lawful owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title."

It is conceded in this case that these taxes were not paid by the respondent every successive year during the seven years. But it was shown that they had been paid before the commencement of the action, by the introduction of ten different delinquent tax certificates, all the receipts showing that these certificates of delinquency had been taken out by different parties other than the respondent. The respondent contends that it is sufficient if the taxes for seven successive years have been paid, while it is the contention of the appellants that these taxes must be paid each successive year. This is the construction which was placed upon this statute by this court in *Tremmel v. Mess*, 46 Wash. 187, 89 Pac. 487, and we think that this is the reasonable construction. The construction of § 5503 (P. C. § 1160), would be different from that of § 5504, because in the former section the person paying the taxes must be in open and notorious possession of the lands or tenements under claim and color of title, while § 5504 provides for a case where there is no possession, and the payment of taxes annually would be, to a certain extent, notice to the owner of a claim against the land.

The claim of the appellants in this case to lots 25 and 26 is based upon the contention that the record had been tampered with, and that no such lots existed, such lots, it is alleged, being a part of Juniper street, and title is alleged in appel-

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Syllabus.

lant Alice D. Dufur, because they are a part of Juniper street and she owns property on either side, and therefore owns the street subject to easement. The subject of change of this plat was gone into at some length in the trial of the cause and, without reviewing the testimony, we think the court was amply justified in concluding that the record spoke the truth upon its face, and that there was no substantial testimony offered showing a change of the plat.

But for the error of the court in decreeing the title to lots 11 and 12 to be in the respondent, the judgment will be reversed, and the cause remanded with instructions to enter a decree in favor of the respondent for lots 25 and 26, with permission to the appellants to remove any improvement that they have on said lots within thirty days from the entry of the decree. The appellants will recover their costs in this court.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

[No. 8062. Department Two. June 25, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Northern Pacific Railway Company, Respondent*, v. J. W. HUGHES, *as Mayor of The Town of Sumas, Appellant*.¹

MUNICIPAL CORPORATIONS—ORDINANCES—ADOPTION—AMENDMENT—FRANCHISES. Under Bal. Code, § 1010, prohibiting the passage of an ordinance granting any franchise within five days after its introduction, an amendment of a franchise ordinance on the day of its passage by the substitution of the name of a railroad company, its successors and assigns, as grantee, in place of a mill company, its successors and assigns, is not such a change in the subject-matter of the ordinance as to render it a new or different ordinance, the purpose of the franchise being to permit the hauling of cars from the mill to the railroad, and being for the joint benefit of both companies.

¹Reported in 102 Pac. 758.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered January 11, 1909, directing the issuance of a writ of mandamus to compel the signing of a city ordinance, after a hearing before the court. Affirmed.

White & Peringer, for appellant.

Carroll B. Graves and *James Kiefer*, for respondent.

PARKER, J.—The appellant is the mayor of the town of Sumas, which is a municipal corporation of the fourth class, in Whatcom county. Under the law of this state relating to such towns, the mayors thereof do not possess any veto power as to ordinances passed by the town council; but upon the lawful passage of ordinances by the council, it becomes the duty of the mayor to sign the same. Bal. Code, § 1012 (P. C. § 3525). And it is also provided by such law:

“No ordinance and no resolution granting any franchise for any purpose shall be passed by the council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting.” Bal. Code, § 1010 (P. C. § 3522).

On the 9th day of November, 1908, there was introduced at a regular meeting of the town council an ordinance entitled:

“An ordinance granting unto the American Lumber Company, a corporation, its successors and assigns, the right to grade, lay ties, and rails, operate and use a railway spur over, upon and across certain streets in the Town of Sumas, Whatcom County, Washington, for the purpose of hauling freight to and from its mill on the Sumas river to the Northern Pacific Railway.”

Thereafter, on the 23d day of November, 1908, at a regular meeting of the town council, such ordinance, before being placed upon final passage, was amended by the council, the principal amendment so made being to change the name of the grantee from “American Lumber Company, a corporation,

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its successors and assigns," to "Northern Pacific Railroad Company, a corporation, its successors and assigns;" and, as so amended, said ordinance was placed upon final passage and passed by the unanimous vote of all the members of the council. The appellant mayor then refused to sign the same, upon the ground that it had not been lawfully passed by the council. Thereupon the relator, Northern Pacific Railway Company, having a beneficial interest therein, commenced this action in the superior court of Whatcom county, praying for a writ of mandate against appellant requiring him to sign said ordinance. A hearing being had before the court where the foregoing facts appeared, the court rendered its judgment against appellant, directing a peremptory writ of mandate to issue commanding him, as mayor of the town of Sumas, to forthwith affix his signature to said ordinance; from which judgment this appeal is prosecuted.

It is contended by learned counsel for the appellant that the ordinance was not lawfully passed by the council, in that it was so amended at the second meeting, at which it was passed, as to render it in substance a different ordinance from the one introduced at the previous meeting, and hence was in violation of § 1010 above quoted.

It has been held by this court, under a provision in the same words relating to cities of the third class (Bal. Code, § 936; P. C. § 3487), that the power of amendment, at the second meeting, is not thereby withheld from the council. In the case of *Vancouver v. Wintler*, 8 Wash. 378, 380, 36 Pac. 278, 685, discussing an amendment which had been made by substitution of a new ordinance at the second meeting, this court said:

"It is a well-known practice of legislative bodies to proceed in this manner, and so long as the substitute is clearly within the limits of the subject-matter of the original proposition, we see no reason why municipal councils should not proceed in the same way."

So the question presented here is whether or not this amendment is within the limits of the subject-matter of the original proposition. We think it is. It appears by the minutes of the council here in evidence that this franchise was asked for by the American Lumber Company and, notwithstanding it was finally formally granted to the Northern Pacific Railroad Company, it is still apparent from the record that it was in the interest of the lumber company as well as the railroad company. The purpose of the amended ordinance was identical with that of the ordinance as originally introduced. As stated in the ordinance, both as introduced and as amended, it was "for the purpose of hauling lumber and timber to and from the mill of the American Lumber Company on the Sumas river to the Northern Pacific railroad." It will also be noticed that the franchise is granted to the railroad company, its successors and assigns, just as it was originally proposed to be granted to the lumber company, its successors and assigns, and there does not appear in the body of the ordinance, as introduced or as finally passed, any restrictions whatever against the assignment of the franchise by the grantee. Thus, it is evident to us that the change in the name of the grantee was in no event such a change in the subject-matter of the ordinance as to render it in substance a new or different ordinance from that which was originally introduced at the previous meeting. Other amendments made at the second meeting were of less consequence than this, and therefore need not be noticed.

We are of the opinion that the judgment of the superior court granting the writ should be affirmed, and it is so ordered.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

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Statement of Case.

[No. 7821. Department Two. June 26, 1909.]

THE STATE OF WASHINGTON, *on the Relation of F. D.*
McCullough, Appellant, v. THE CITY OF SEATTLE,
*Respondent.*¹

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—REFUNDS—LIMITATIONS. Seattle Charter, art. 8, § 17, requiring demand for refunds on excess payments to be made within two years from the date an assessment is due, is valid as a statute of limitation.

SAME—COMMENCEMENT OF PERIOD—WHEN "DUE." Seattle Charter, art. 8, § 17, requiring demand for refunds in excess payments to be made within two years from the date an assessment is "due" has reference to the date when an assessment may be paid and the lien discharged without added interest, although the assessment is payable in installments and not delinquent until a later period.

SAME—POSTPONEMENT OF LIMITATION. Failure to complete an assessment and ascertain whether there would be an excess at the time the assessment is due would not postpone the commencement of the limitation for making a demand for a refund to a time later, in any event, than the completion of the improvement.

SAME—ACTION TO RECOVER REFUND—LIMITATIONS. Under Bal. Code, §§ 4800, 4805, an action against a city to recover a refund on an excessive assessment must be commenced within at least three years after demand.

SAME—LIMITATION OF ACTIONS—TRUSTS. There is no trust relation existing between a city and property owners, by reason of the city's collection of excess assessments, that would prevent the running of the statute of limitations upon rights of action by the property owners to recover a refund given them by statute; since the statute runs where the beneficiary has notice and a right of action at law.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 9, 1908, upon findings in favor of the defendant, denying a writ of mandate to compel a city to pay surplus funds collected upon assessments for a local improvement, after a trial on the merits before the court without a jury. Affirmed.

C. M. Miller, for appellant.

Scott Calhoun and *Howard A. Hanson*, for respondent.

¹Reported in 102 Pac. 770.

PARKER, J.—This case comes to us upon appeal from the superior court for King county, where judgment was rendered denying the relator's application for a writ of mandate requiring the city of Seattle to pay to him certain surplus funds collected from his assignors upon assessments for a local improvement in excess of the cost thereof. The facts upon which the respective rights of the relator and the city depend are before us in the findings of the learned superior court, the correctness of which is conceded, and so far as necessary for our consideration are as follows:

The city of Seattle by ordinance provided for improvement of certain alleys to be paid for upon the local assessment plan, creating a local improvement district therefor. Thereafter the city made and approved an assessment roll, charging the property benefited by the improvement in the total sum of \$3,436.19, which was certified to the city treasurer for collection on March 22, 1904, and was thereafter payable without interest up to and including April 22, 1904, after which date any unpaid assessments were placed upon the bonding system under the five year plan, payable in five equal annual installments, with interest thereon. The final cost of the improvement was only \$2,398.59, which, it will be noticed, resulted in the total assessment being considerable in excess of the cost. It does not appear just when this excess of the assessment over the cost became known, but the improvement was completed August 1, 1904, from which, in the absence of other showing, we will assume that the excess of the assessment over the cost became known not later than that date.

It does not appear from the record why the total cost of the improvement resulted in a less amount than the total assessment, but we regard this of no consequence as affecting the rights of these parties, since all of the relator's assignors have paid their assessments, and all but one small assessment have been collected from the owners of all the benefited property, from which the total cost of the improvement has been paid, leaving a surplus, none of which

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has been refunded. This the city now claims as its own because no demand has been made or suit prosecuted to recover the same within the period provided by the city charter and the statutes limiting the time for commencement of actions.

On January 16, 1905, demand was made for refund of excess payment on one lot which had been assessed at \$108.75, and on July 27, 1908, demand was made for refund of excess payment on another lot which had been assessed at \$207.50; no other demand for refund was ever made, save by the bringing of this action on August 24, 1908. The relator is the owner by assignment of claims of property owners who have paid a total of \$2,547.18 upon the assessments, and as such assignee he contends that he is entitled to \$974.04 of the surplus assessment so collected. The superior court decided against relator's contention, upon the ground that his right was barred by the charter and state law.

Section 17, article VIII of the Seattle charter provides:

"Disposition of surplus funds.—Section 17. Any funds remaining in the treasury belonging to the fund of any local improvement district, after the payment of the whole cost and expenses of such improvement, in excess of the total sum required to defray all the expenditures by the city on account thereof, shall be refunded, on demand, to the amount of such overpayment; and if there shall be an excess in the assessment of any person who shall not have paid his assessment, a rebate shall, on demand, be allowed to such person to the amount of such over-assessment; Provided, such demand thereinabove provided for be made within two years from the date upon which the assessment for such local improvement district became due. Any such funds remaining in the treasury after the expiration of two years from the date aforesaid for which no demand has been made as herein provided, belonging to any local improvement district, after the payment of the whole cost and expense of such improvement, shall be transferred to the general fund."

In the case of *Müller v. Seattle*, 50 Wash. 252, 97 Pac. 55, this provision of the charter was held to be valid as a statute

of limitation, so far as it affects the rights of one seeking to recover surplus assessments paid by him. So we do not feel called upon to further notice the contentions of appellant's counsel against its validity at this time, especially since such contentions are substantially the same as were made against it in that case.

The principal question in this case arises upon the construction of that part of the charter provision above quoted which requires that the demand for the excess "*be made within two years from the date upon which the assessment for such local improvement district became due.*" And in this connection it is contended by counsel for appellant that since this assessment was payable in five annual installments, at the election of the property owner, it was not all enforceable and hence not due until the end of that period, and that the property owners had two years after the expiration of that period within which to make their claim for the excess; while counsel for the city contend that the word "due" as here used relates to the period within which the assessment may be paid and the lien thereof discharged by the property owners without added interest, which period they contend ended April 22, 1904.

The meaning of the word "due" seems to be influenced largely by the connection in which it is used, and while it has been the subject of many decisions by the courts, no general rule of interpretation can be safely stated therefrom. 10 Am. & Eng. Ency. Law (2d ed.), p. 277; 14 Cyc. 1107. It seems to us, however, that when used in connection with the payment of a tax, as it is here, the word is commonly understood to have reference to the period while the owner has the right to pay the tax and discharge the lien thereof, without added interest or other charge.

We are of the opinion that the word "due", as used in this charter provision, means the expiration of the period within which the assessments could be paid without added interest, and that it was intended to have the two-year limitation

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period for making the demand start running at that time. However, the beginning of the period within which the demand must be made may be influenced in this particular case by another consideration seeming to arise on the facts, and that is the improvement was not completed until August 1, 1904, some months after April 22, 1904, the time fixed by the city authorities within which payment of assessments might be made without interest; from which it is argued by counsel for appellant that the cost was not determined until completion, and therefore the fact that there would be a surplus was necessarily unknown. Whether or not the cost was unknown up to the time of the completion of the improvement, is here a matter of inference only. Since we have no direct finding in the record upon that fact, but in view of the assessment being larger in amount than the cost, it is fair to presume it was being constructed by the city in some manner which rendered the final cost thereof determinable only upon completion. This, however, would in any event only have the effect of delaying the starting of the two-year limitation until it became known there would be an excess in the assessment.

Since we conclude that the two-year limitation for making the demand commenced in any event not later than the completion of the improvement on August 1, 1904, and no demand, except as to one lot, was made for a return of the excess until July 27, 1908, and afterwards by the bringing of this action, it is plain that the two-year limitation had practically twice run its course, and therefore barred all claims except as to the excess paid upon the one lot, which was demanded January 16, 1905; but this action was not commenced until August 24, 1908, over three and one-half years after that demand, when it seems plain to us the right of action upon that demand accrued. Whatever period may be considered as the statutory limit for the bringing of this action, it in no event can be longer than three years. Pierce's Code, §§ 285, 289a (Bal. Code, §§ 4800, 4805).

It is urged by counsel for appellant that the trust relation existing between the city and the property owner who is entitled to the surplus is such that appellant's right is not affected by the statute of limitation. But we think it plain, whatever may be considered the technical nature of such trust, it does not belong to that class of trusts which were formerly exclusively within the jurisdiction of a court of equity. It is clear that appellant had a right of action at law for the recovery of this surplus. It seems to be well settled that when a beneficiary can enforce his rights by an action at law and has notice of his rights, the statute of limitations runs against him. *Kane v. Bloodgood*, 7 Johns. Ch. 90; 25 Cyc. 1155; Wood, Limitations (3d ed.), §§ 123, 200; Kelly, Code Statute of Limitations, §§ 284, 285.

It is unnecessary for us to consider other contentions of appellant, since we are of the opinion that his rights in the premises are all barred by the limitations prescribed in the city charter and the state law. The judgment of the superior court is affirmed.

MOUNT, DUNBAR, and CROW, JJ., concur.

RUDKIN, C. J. (concurring)—I concur in the judgment on the ground that the action is barred by the general statute of limitations of the state.

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Opinion Per MORRIS, J.

[No. 7985. Department One. June 26, 1909.]

H. D. YOUNKMAN *et al.*, Respondents, v. C. D. HILLMAN
et al., Appellants.¹

LOTTERIES—CONTRACT—CONSTRUCTION—"PURCHASERS." An offer of a prize to the "purchasers" of a lot in a townsite cannot, before completion of his contract, be taken advantage of by one who had entered into the usual land contract for purchase on installments, title remaining in the vendor until all payments were made, with right of forfeiture in case of default.

Appeal from a judgment of the superior court for King county, Charles E. Shepard, Esq., judge *pro tempore*, entered January 7, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Fred'k R. Burch, for appellants.

O. A. Tucker and *Alfred E. Parker*, for respondents.

MORRIS, J.—On the 26th day of October, 1907, the appellants published an advertisement of the sale of lands belonging to them, situate at Boston Harbor. Among other inducements held out to intending purchasers, was the following: "\$500 for the first baby born." On the next day they ran an excursion from Seattle to Boston Harbor, and on the trip distributed circulars containing a similar offer in these words: "\$500 in gold coin will be given away to the first baby born." On November 10, a second excursion was run. Defendant Hillman, being on board, announced to those present that he would pay a reward of \$500 to the first married couple to whom a child should be born upon any portion of the property known as Boston Harbor, conditional only upon the purchase by contestants of lots within the Boston Harbor plat. Plaintiffs, being authorized by Mother Church and the law of the land, and deeming them-

¹Reported in 102 Pac. 773.

selves possessed of other necessary qualifications, gazed upon the golden crown, held out to the victors in this tournament of love, with longing eyes, and then and there announced their intention of entering the contest. Defendant Hillman, being somewhat of a boomer and doubtless being of the same mind as a distinguished citizen of this Nation, looked with favoring eyes upon any increase in the birth rate, and instructed plaintiffs how to equip themselves for the race by becoming purchasers of Boston Harbor lots, it being remembered that this was the one evidence of good faith demanded from all contestants, before entry, and the only condition under which competition was to be permitted. Plaintiffs, confident of their ability to win the prize, duly entered into the required contract on November 11, 1907, whereby they agreed to purchase a lot in Boston Harbor for the sum of \$1,000, paying \$10 down, giving a chattel mortgage upon a piano in the sum of \$90, and contracting to pay \$10 each month thereafter, with quarterly interest, until the purchase price should be paid, when they were to receive a good and sufficient deed.

It was further provided that, in case of failure in making the payments as due, the contract might be rescinded at defendants' election, and all sums then paid upon the contract should be forfeited; time being of the essence of the contract. Plaintiffs took possession of their lot and, on December 7, 1907, the stork made its first visit to Boston Harbor, leaving a baby girl at plaintiffs' home. Flushed with pride upon the realization of their fondest hopes, plaintiffs hastened to the defendant Hillman to apprise him of the happy event, choosing December 17 as the day for making the glad announcement; when, much to their surprise and disappointment, Hillman refused to partake of their joy, and heartlessly and coldbloodedly referred them, like Shylock of old, to the obligation of their bond, insisting that they had not as yet complied with its terms in that they were not purchasers. Being unable by argument or entreaty to dissuade Hillman from this position, they brought suit, and finding the lower

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Opinion Per MORRIS, J.

court in a more complacent mood than Hillman, they obtained a judgment against both defendants in the full sum of \$500; whereupon the defendants became aggrieved and, seeking to deprive plaintiffs of the fruits of their victory, took an appeal.

It is apparent that the only question of law involved in this appeal is, Were the plaintiffs purchasers? Broadly speaking, a purchaser is one who acquires title otherwise than by descent; but in its generally accepted meaning it refers to the acquisition of property for a valuable consideration. The contract entered into between the parties hereto was in no sense a transfer of the title. Appellants divested themselves of no rights nor interests in the property, except possession and those rights incident to possession. Their contract was to convey by a good and sufficient deed upon respondents' compliance with all the terms and conditions to be by them performed. There is no language in the contract that can be interpreted into a present sale. The terms adopted by the parties to express their intention are: "party of the first part will sell;" "party of the second part will purchase;" and these agreements are to be performed upon full compliance with other and attendant agreements. The whole tenor and effect of the contract is clearly in contemplation of a future and not a present sale. Such contracts have invariably been held to be contracts for title or agreements to convey, not ripening into even an equitable title until the vendee has placed himself in such a position by performance that he can compel a conveyance. *Chappell v. McKnight*, 108 Ill. 570; *Nunngesser v. Hart*, 122 Iowa 647, 98 N. W. 505; *Stewart v. Fowler*, 37 Kan. 677, 15 Pac. 918.

The obligation of the vendor in these contracts is similar to that of the obligor in a bond for a deed, and it is held that "a bond to convey land is not a title, but simply a contract to convey title." *Martin v. Wright*, 21 Ga. 504; *Dahl v. Pross*, 6 Minn. 89. We cannot regard respondents as purchasers, there being no investment of any title in them; nor,

under the contract, any passing of title until a compliance with its terms. A purchaser means one who has acquired the title, not one who holds under a bond for a conveyance. *Gilpin v. Davis*, 2 Bibb (Ky.) 416.

In *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. 781, we held that contracts providing for forfeiture of installments paid at option of vendor, as does this contract, were conditional sales; and in *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 899, and *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406, the holding was that such contracts convey no title. We are inclined to regard these authorities as decisive. Respondents, then, not being purchasers, were not in a position to enforce their demand.

The judgment is reversed, and the cause remanded with instructions to dismiss.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 7962. Department One. June 26, 1909.]

GEORGE LAWLER, *Appellant*, v. J. ARMSTRONG *et al.*,
Respondents.¹

BROKERS—AUTHORITY—RATIFICATION. A broker is the agent of the vendors where it appears that he approached them advising that he had a prospective purchaser, that they agreed to pay a commission in case of a sale, and that the broker signed a contract as "agent for the owner," which was approved in writing by the owners, thereby ratifying the agency.

BROKERS—RIGHT TO COMMISSIONS—CONSUMMATION OF SALE. Under an agreement to pay a broker commissions on a cash sale, "in case sale is consummated, or one-third of earnest money in case same is forfeited," the broker is entitled to recover commissions, where, after a sale to a responsible party, who refused to consummate it, the vendors elected to sue for specific performance, recovered a collectible judgment for the price, and compromised the same on a slight reduction, without the consent of the broker; as the sale was thereby consummated.

¹Reported in 102 Pac. 775.

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Opinion Per Gose, J.

SAME—DUTY OF BROKER—FAILURE TO DISCLOSE. Failure of a broker to disclose that the purchaser was acting as agent for an undisclosed principal is not a defense to an action for commissions, where the ostensible purchaser was responsible and the vendors were not injured.

SAME—CONTRACT TO DIVIDE. An undisclosed agreement by a broker to divide his commissions with the purchaser is no defense to an action against the vendors for the commissions, where they were not injured thereby.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered December 23, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to recover a broker's commission. Reversed.

Ellis, Fletcher & Evans, for appellant.

Burkey, O'Brien & Burkey, for respondents.

Gose, J.—The appellant, a real estate broker, instituted this action for the purpose of recovering a stipulated commission from the respondents upon a written contract for the sale of real estate. The applicable part of the contract is in the following language:

"Received of R. D. McDonald, purchaser, the sum of five hundred (\$500) dollars as earnest money and in part payment for the purchase of lots 18 and 19, block 1906, Jefferson Street Addition to the City of Tacoma, Washington, with the buildings and improvements thereon, which we have this day sold to said purchaser, subject, however, to conditions named in this contract, for the sum of thirty thousand (\$30,000) dollars on the following terms: \$500 cash herewith. \$29,500 cash within ten days after delivery of abstract showing clear title. . . .

"It is agreed that if the title to said premises is not good, or cannot be made good within 30 days from date . . . this agreement is void and the earnest money shall be refunded. But if the title to said premises is good, . . . and the property is not taken by the said purchaser within five days after written notice is mailed to his address, the earnest money shall be forfeited to George Lawler. The

above forfeiture shall in no way impair the right of either party to enforce the specific performance of this contract.

"George Lawler,"

"Agent for the Owner or Seller."

"By George Lawler."

"I hereby agree to purchase said property on the above terms, and pay \$30,000 as specified above.

"R. D. McDonald, Purchaser,

"Address, 1301 Pacific Ave.

"Tacoma, Sept. 19th, 1907.

"We approve the above sale and agree to pay George Lawler \$750 in case sale is consummated or 1-8 of earnest money in case same is forfeited, and covenant that we are the owners of the above described property in fee simple.

"J. Armstrong,"

"P. F. Hylebos."

The complaint charged, and the evidence established, that the appellant received from the purchaser \$500 earnest money, and paid the same to the respondents; that upon the failure of McDonald to accept the title and pay the respondents the \$29,500, as required by the contract, they commenced an action against him for specific performance, and recovered a judgment therein for such sum, with interest thereon at the rate of six per cent per annum from the 21st day of October, 1907, such judgment providing that all the interest of both the plaintiff and the defendants in the property described in the contract should be sold under a writ of execution; that the proceeds of such sale should be applied on the judgment, and that execution should also run and be enforced against the property of the defendants. The complaint further avers, that McDonald had ample property to satisfy the judgment at the time of its rendition; that the defendants settled the judgment with McDonald, and that the sale had been fully consummated. The case was tried to the court, terminating in a judgment for the defendants. An appeal was taken from such judgment.

It satisfactorily appears from the evidence that McDonald, a shoe merchant, at the instance of one Henry Mohr, ap-

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proached the appellant with a view to buying property suitable for the accommodation of a wholesale business. Thereupon the appellant called upon the respondents, and advised them that he had a prospective customer for their property. After some conversation about the matter, the respondents said to him that they wanted to make a cash sale of the property for \$80,000. The appellant replied that, if the sale was for cash, the respondents would be required to pay the commission. It was finally arranged that the respondents would pay the commission stated in the contract on a cash transaction. The appellant then renewed negotiations with McDonald, who then advised him that he was buying for another party, but did not disclose the name of his principal. Upon receiving this information, the appellant, of his own volition, said to McDonald that he would allow him one-half of his commission. The contract heretofore quoted was then executed by the several parties. The evidence fails to show that the appellant knew the name of McDonald's principal at the time the contract was signed. The appellant testified that McDonald's statement was that others were interested with him in the transaction. The evidence shows conclusively that there was no engagement upon the part of any one other than the respondents to pay a commission to either McDonald or the appellant. The service of McDonald to his principal Mohr was a gratuitous one.

Subsequent to the rendition of the judgment, the "Home Land & Improvement Company," through Henry Mohr, its president, took the property and settled the judgment by paying \$12,000 cash and engaging to pay the respondents \$18,000 with six per cent interest in deferred payments. The respondents, by the terms of the settlement, retained the \$500 earnest money in lieu of accrued interest, rebating the balance of the interest amounting to about \$600. The settlement was made and the judgment satisfied without the advice or consent of the appellant. The evidence shows that the judgment could have been collected in full from McDonald.

After the respondents commenced their action against McDonald and before trial, they knew that Henry Mohr was the principal in the transaction and that McDonald had purchased the property for him and at his request, but took no steps to establish his liability as an undisclosed principal. The evidence also shows that McDonald was a married man, and that the larger part of his property, and perhaps all of it, belonged to the community. We have stated the substance of the testimony as to the oral contract for the payment of the commission, for the reason that the respondents asked to have the written contract reformed so as to show that the payment of a commission was upon a cash transaction only. The parties are in substantial accord as to what the oral contract was, and, in our opinion, it did not differ from the written one.

The respondents urge six reasons which they assert require an affirmance of the judgment: (1) That the appellant was the agent of McDonald and not the agent of the respondents; (2) the appellant was not entitled to a commission except upon the consummation of a sale for cash; (3) the sale was not consummated; (4) the appellant did not produce a purchaser ready, able, and willing to buy on the terms agreed upon by the respondents; (5) the failure of the appellant to disclose the fact that McDonald was not the actual purchaser precludes a recovery; (6) the arrangement of the appellant to divide his commission with McDonald deprives him of the right to recover.

If the respondents' first contention, that the appellant was not their agent, is well founded, then their points 5 and 6 must fail. Confessedly, if the appellant was not their agent but was the agent of McDonald, he owed them no duty as to advising them as to whom McDonald represented, nor did the agreement to divide his commission concern them. The duty of good faith to them could only arise out of some relation of trust or confidence.

We will first consider whether the appellant was the agent

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of the respondents in procuring the execution of the contract. The testimony of the respondents conclusively shows that, in the first conversation they had with the appellant, he advised them that he had a prospective purchaser for their property. They understood that, if the sale was made for cash, they would be required to pay the commission. We quote from the testimony of the respondent Hylebos: "Dr. Armstrong, his co-respondent, said: 'If we give it to the agent we will have to pay a commission.'"

Moreover, the contract of sale was executed by the appellant on behalf of the respondents as "agent for the owner or seller." The respondents thereupon in writing "approved the above sale." If any weight is to be ascribed to the use of these words, the conclusion is inevitable that the respondents ratified the agency which the appellant at least assumed in signing the contract. It is elementary that agency may be created by written or spoken words or by the conduct of the parties. The appellant's authority to act as agent for the respondents was created both by conduct and by apt written words. When the respondents approved his sale, they ratified his agency. *Roberts v. Hilton Land Co.*, 45 Wash. 464, 88 Pac. 946; *Service v. Deming Inv. Co.*, 20 Wash. 668, 56 Pac. 837. However, the fact of his agency would not affect his right to recover in this case, as such right is predicated upon the contract which we have quoted.

We will next consider the respondents' 2d, 3d and 4th propositions together. The contract provided that \$29,500 should be paid within ten days after delivery of an abstract showing title. We quote again from the part of the contract touching the respondents' liability:

"We approve the above sale and agree to pay George Lawler \$750 in case sale is consummated, or one-third of earnest money in case same is forfeited."

The contract shows that \$500 had been paid, and the evidence is uncontradicted that the appellant had paid that sum as earnest money to the respondents. Upon the failure of

McDonald to pay the unpaid purchase price and accept the title, either of two courses was available to the respondents; (1) to forfeit the \$500 earnest money, retain two-thirds and pay one-third to the appellant; or (2) to sue for specific performance. They chose the latter. Upon the plainest principles of justice they cannot avail themselves of the appellant's labor and his customer to make a sale of their property, and then deny his right to recover because the purchaser did not voluntarily pay the cash. It is true that the contract called for a consummated sale for cash before the right to a commission arose, but it is likewise true that the appellant had an equity in the contract and a one-third interest in the earnest money, subject to the right in the respondents to enforce the contract or forfeit the earnest money. Manifestly they cannot enforce specific performance of the contract, obtain a collectible judgment, compromise it at a small loss without the advice or consent of the appellant, and then claim immunity from liability. None of the cases cited are exactly in point, but there is ample authority which in principle supports the view we have announced. As we view the case, it presents the simple question of ratification or waiver, and from either standpoint the respondents' liability is complete. In contemplation of law, when the respondents elected to compel the specific performance of the contract and obtained an enforceable judgment, the contract became consummated. It is urged that the judgment was not collectible from the community property of McDonald and wife, because McDonald in fact was acting as agent for an undisclosed principal. Surely, when he contracted for property as a principal, the community could not be heard to deny liability upon such a ground.

In *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551, speaking to the question as to when a broker's right to a commission accrues, at page 420, it is said:

"He further suggests that the agreement was to find a cash purchaser, but if the appellants assented to the terms proposed, it was the equivalent of cash."

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In *Norris v. Byrne*, 38 Wash. 592, 80 Pac. 808, the broker had procured a customer ready, able, and willing to buy at a price agreeable to the owner. The broker, at the instance of the customer, endeavored to get a few days' time for the purchaser to make arrangements to close the transaction. The owner refused to acquiesce in the time limit; whereupon the broker sent the customer to the principal. The negotiations between the principal and the purchaser resulted in an arrangement whereby the latter was given time in which to make the payment. The trade was thereafter closed between the principal and the purchaser. Speaking to the liability of the principal, the court, at page 598, said:

"Respondents having reaped the benefit of appellant's information and services in the matter, are not in a position to deny liability for the commission asked."

In *Goss v. Broom*, 31 Minn. 484, 18 N. W. 290, the broker sued for the recovery of a stipulated commission. His engagement with his principal was to find a purchaser for the property on the basis of \$8,000, \$3,000 cash, \$5,000 in three years. The broker found a purchaser who agreed to buy on the terms stated. No money was paid to the broker, but the purchaser gave him his check for \$100. The defendant was informed of the contract of sale the day it was made, and on the following day the principal sold the property to another party. The principal claimed an immunity from liability because the broker did not procure the payment of money. The court, speaking to this question, said:

"The appellant claims that the agent did not comply with the conditions imposed upon him in that he did not procure the payment of any money from Paulson. It does not appear that it was the plaintiff's duty, in exercising the authority conferred, to procure the payment of any money. He became entitled to the stipulated compensation when he had done all that he was empowered to do. This he did by negotiating a sale and making a contract binding the purchaser to a performance of the terms prescribed. The power of the agent extended no further."

From the syllabus in *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549, we excerpt the following:

"One authorized as agent to sell land, but without power to convey, who has procured a purchaser, and bound him by contract to purchase the land upon the terms prescribed by the principal, or upon such modified terms as the principal has elected to accept and ratify, has performed his duty, and is entitled to the stipulated commission."

"Yet it is equally well settled that, if the principal ratify the contract made by the agent, the substituted terms become a part of the original agreement, and can be enforced as such." *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. 683.

In *Henninger v. Burch*, 90 Minn. 43, 95 N. W. 578, it was held that a complaint which charged that the property owner agreed to pay a broker a commission of \$100 to secure a purchaser for certain property at the price of \$1,900, and that the owner sold the property to the broker's customer for \$1,850, knowing him to be such, stated a cause of action for the recovery of the commission.

Passing to the consideration of point 5, we find that the rule is well settled that the broker must act with entire good faith towards his principal, and must disclose to the principal all facts within his knowledge which are material to the matter in which he is employed. In the instant case, the only fact which the appellant failed to communicate was that McDonald was acting as agent for an undisclosed principal, or, as appellant states, that other parties were interested in the purchase. In view of the fact that the testimony shows that McDonald was financially able to carry out his contract, it is evident that the respondents were not injured. The rule for which the respondents contend is applicable when there is either actual or constructive fraud. If the evidence indicated that the appellant had knowingly induced the respondents to enter into a contract with an impecunious purchaser, and that he had knowingly withheld from them the name of an actual purchaser pecuniarily able to complete the

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contract, or if any other circumstance of fraud was present, we would hasten to afford them relief. No such facts or circumstances appear in the record. The point is therefore not well taken. *Bertelson v. Hoffman*, 35 Wash. 459, 77 Pac. 801; *Veasey v. Carson*, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241; *Gelatt v. Ridge*, *supra*; *Glover v. Layton*, 145 Ill. 92, 34 N. E. 53.

Passing to the respondents' final contention, the record does not disclose that they were injured by the agreement of the appellant to divide commission with McDonald, and such fact therefore does not militate against his right to recover. *Scott v. Lloyd*, 19 Colo. 401, 35 Pac. 733; *Chase v. Veal*, 83 Tex. 333, 18 S. W. 597; *Boyd v. Watson*, 101 Iowa 214, 70 N. W. 120; *Henninger v. Burch*, *supra*.

The judgment will be reversed, with directions to the trial court to enter a judgment for the appellant as prayed for in his complaint. The appellant will recover his costs.

RUDKIN, C. J., FULLERTON, and MORRIS, JJ., concur.

[No. 7776. Decided June 28, 1909.]

THE STATE OF WASHINGTON *on the Relation of John D. Atkinson, Attorney General, Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.¹

STATUTES—TIME OF TAKING EFFECT—COMMERCE—LIMITING HOURS OF LABOR—CARRIERS—REGULATION. Act Cong., March 4, 1907, making it unlawful for any common carrier to require employees to remain on duty for a longer period than sixteen consecutive hours, and providing that the act shall "take effect and be in force one year after its passage," did not take effect as a law until the end of such period; and it did not supersede, during such year, a prior state statute on the same subject (Laws '07, p. 25), upon any principle of comity, or upon the theory that Congress had occupied the field of statutory regulation and fixed a reasonable time to allow carriers to comply with the regulations.

¹Reported in 102 Pac. 376.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered December 4, 1907, in favor of the plaintiff, upon sustaining a demurrer to the answer, in a prosecution for the violation of a statute regulating the hours of service of railway employees. Affirmed.

Geo. T. Reid and *J. W. Quick*, for appellant.

John D. Atkinson, Attorney General, *J. B. Alexander* and *W. V. Tanner*, Assistants, for respondent.

FULLERTON, J.—The legislature of the state of Washington at its session of 1907 passed an act (Laws 1907, p. 25, ch. 20) regulating the hours of service of railroad employees. By the act it was made unlawful for any common carrier operating a railroad to require or permit any of its employees engaged in or connected with the movement of its trains to remain on duty for a longer period than sixteen consecutive hours, except in certain specified instances. A violation of the act was made a misdemeanor, subjecting the offending carrier to a penalty of not less than one hundred nor more than one thousand dollars for each offense, to be recovered in a suit brought by the attorney general on a duly verified information being filed with him showing that a violation of the act had occurred. This act, as it had no emergency clause, went into effect on June 12, 1907.

On March 4, 1907, the Congress of the United States passed an act on the same subject-matter. 34 Stat. at Large, p. 1415, ch. 2939. In this act, among other provisions, it was made unlawful for any common carrier, its officers or agents, to require or permit any employee to be or remain on duty for a longer period than sixteen consecutive hours, under a penalty not to exceed five hundred dollars for each and every violation, to be recovered by suit brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where the act was committed, on satisfactory evidence being lodged with

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the district attorney that there has been a violation of the act. It was expressly provided, however, that this act should "take effect and be in force one year after its passage," or on March 4, 1908.

On August 26, 1907, the attorney general of the state of Washington brought the present action against the appellant, charging it with a violation of the state statute in the operation of one of its freight trains between Seattle and Sedro Woolley, both points being within the state of Washington. In the complaint it was averred that the train left the terminal station at Seattle at 6:30 a. m. of July 3, 1907, and reached Sedro Woolley, another terminal station, at 2:15 a. m. of July 4, 1907, being on the way nineteen hours and forty-five minutes, during which time the employees in charge of the train, to wit, the engineer, fireman, two brakemen, and the conductor were required to be on continuous duty. Judgment was demanded for one thousand dollars, the maximum amount of the penalty.

The appellant answered admitting the specific charge that it had at the time mentioned required its employees to work continuously for a period of nineteen hours, but denied that it was thereby guilty of violating any state statute. It then set out affirmatively that it was a common carrier engaged in carrying interstate as well as intrastate commerce; that the freight train on which its employees were engaged at the time complained of was carrying various and sundry articles of merchandise shipped from points without the state to points within the state of Washington; various and sundry articles of merchandise shipped from points within the state of Washington to points without such state; and various and sundry articles of merchandise shipped through the state from points without the state to other points without the state. It then set out the act of Congress of March 4, 1907, above mentioned, and averred that it was governed in relation to the number of hours it might require its employees to remain continuously on duty by that statute, and that the

statute of the state regulating such hours of labor was not, at the time alleged in the complaint of the plaintiff, applicable to that particular train, or the employees engaged therein; and claimed immunity from the penalties imposed thereby. A demurrer was interposed to the answer, and sustained, whereupon the appellant elected to stand thereon and refused to plead further. Judgment was thereupon entered against it for the full amount of the penalty, and this appeal taken therefrom.

Counsel for the appellant concede that it is within the power of the state, in the absence of Congressional legislation on the subject, to enact laws operative within the boundaries of the state regulating the number of hours an employee of a railroad company can be required to remain on continuous duty, even though the railroad company may be a common carrier engaged in interstate commerce. On the other hand, it is conceded by the state that the power of the Congress to regulate interstate commerce is plenary, and that, as an incident to this power, the Congress may regulate by legislation the instrumentalities engaged in the business, and may prescribe the number of consecutive hours an employee of a carrier so engaged shall be required to remain on duty; and that when it does legislate upon the subject, its act supersedes any and all state legislation on that particular subject. In fact, these propositions can hardly be said to be debatable in the state courts, since the Federal courts, whose decisions are authoritative on questions of this character, have repeatedly announced them as governing principles in determining the validity of regulative legislation concerning carriers of interstate commerce. *Escanaba etc. Transp. Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; *Morgan etc. S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237; *Nashville etc. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064; *Lake Shore etc. R. Co. v. Ohio*, 173 U. S. 285, 19

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Sup. Ct. 465, 43 L. Ed. 702; *Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897.

Since, therefore, both the Congressional and state statutes relate to the same subject-matter, and purport to regulate the same specific acts, it is manifest that the Congressional statute superseded the state statute at some point of time, determined by the determination of the status of the Congressional act between the time of its enactment on March 4, 1907, and the time it became actively operative on March 4, 1908. If it had the effect of a law during the period it remained in suspension, then manifestly the state statute never went into effect, in so far as it related to roads engaged in interstate commerce; while, on the other hand, if it became effective as a law at the expiration of the year, the state statute became effective as against roads engaged in interstate commerce, on June 12, 1907, and continued in force until March 4, 1908, and was operative at the time the acts here complained of were committed.

The general rule is that a statute speaks from the time it goes into effect, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect.

"A law must be understood as beginning to speak at the moment it takes effect, and not before. If passed to take effect at a future day, it must be construed as if passed on that day, and ordered to take immediate effect." *Rice v. Ruddiman*, 10 Mich. 125.

"A statute passed to take effect at a future day must be understood as speaking from the time it goes into operation and not from the time of passage. Thus, the words 'herebefore,' 'hereafter,' and the like, have reference to the time the statute becomes effective as a law, and not to the time of passage. Before that time no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms; it is equivalent to a legislative declaration that the statute shall have no effect until the designated day." 26 Am. & Eng. Ency. Law (2d ed.), p. 565.

See, also, *Price v. Hopkin*, 13 Mich. 318; *Grant v. Alpena*,

107 Mich. 335, 65 N. W. 230; *Galveston etc. R. Co. v. State*, 81 Tex. 572; *Jackman v. Garland*, 64 Me. 133; *Evansville etc. R. Co. v. Barbee*, 59 Ind. 592.

Applying this principle to the question before us, it seems clear that the Federal statute did not speak as a statute until after March 4, 1908, the date on which it went into effect; for if a law passed to take effect at a future day must be construed as if passed on that day, and if, prior to the time it goes into effect, no rights can be acquired under it and no one is bound to regulate his conduct according to its terms, it is idle to say that it has the effect of a statute between the time of its passage and the time of its taking effect. A statute cannot be both operative and inoperative at the same time. It is either a law or it is not a law, and, without special words of limitation, when it goes into effect for one purpose it goes into effect for all purposes. So with this statute, it cannot be a law between the day of its passage and the day it is made to go into effect, for the purpose of superseding the state statute, and not a law for any other purpose. Undoubtedly the Federal legislature could have so framed its act as to supersede state legislation on the subject-matter involved, and at the same time have given the carriers affected a year within which to regulate their business to meet the changed conditions, but it did not do this; it postponed the operation of the entire act for one year after its passage, leaving the field open for state legislation during that period, and this being true, it follows as of course that the act did not suspend or supersede the state legislation on the same subject-matter on any principle of paramount right of legislation until the end of the year.

These propositions have seemed to us so self-evident as scarcely to admit of debate. Our attention, however, has been called to two recent cases which maintain the contrary view. The first is *State v. Chicago etc R. Co.* (Wis.), 117 N. W. 686. The state statute there before the court was one limiting the number of hours a telegraph operator might be

required by the company to remain on continuous duty at the station of a railroad company engaged in interstate commerce. The court held the statute invalid on two grounds; first, that the "restriction of the hours of labor of telegraph operators engaged in moving interstate trains or traffic is a field of legislation denied to the state by the Federal constitution;" and second, that the statute "is in conflict with and in negation of the act of Congress." Discussing the latter question, the court used this language:

"Not less obviously the act of Congress declared a policy that interstate railroads should have a reasonable time in which to adjust their business to the new restrictions, by postponing the date when the law should become operative for one year after its passage, thus indicating that such period of time was so necessary to reasonable convenience of interstate commerce. Indeed, this latter implication is not only clear from the act, but made the more certain by reference to the debates and reports of committees attending the consideration and passage of the law of Congress. Hence a state provision to the effect that the time for such preparation and adjustment should be restricted to the 1st of January, 1908, as contained in chapter 575, p. 1188, Laws of 1907, is in direct conflict with the policy of Congress."

The second case is *State v. Missouri Pac. R. Co.*, 212 Mo. 658, 111 S. W. 500. The state statute before the court was similar to that in question in the former case. The decision was rested on the ground that the Federal statute had superseded the state enactment, the court saying:

"We must construe the federal act by reading into dry letter its manifest spirit and purpose. Its dry letter reads that it shall not go into effect for one year. What was the meaning of, the object to be subserved by, that suspension of the operation of the law? What, except to preserve the equities of the situation by impliedly giving common carriers engaged in interstate commerce one year in which to get a supply of experienced telegraph and telephone operators and trainmen to carry on their business without interruption and hindrance, and otherwise adjust their business affairs to the shorter hours required by that act? When broadly

judged, the federal law must be construed as a notice (in the nature of a caveat) to all state Legislatures, first, that Congress has occupied the ground by its statutory regulations; second, that in its high wisdom it has prescribed and marked out a transition or preparatory period of one year (a sort of truce period). Now with such broad and wise purposes read into the federal act shall any state Legislature thereafter sit in judgment upon the wisdom of such truce period, and say, in effect, 'We deem it too long and too liberal'? Shall it say, in effect, 'We see you have suspended your act for one whole year; we find by mathematical computation there is left six months or so which we may cover by a state law, and accordingly we shall pass a law giving shorter hours than yours that will be good at least from June 14, 1907, until March 4, 1908'? If the one law grants, by necessary implication, a breathing spell, shall the other take it away? If the one chalks out a policy, may the other rub it out? In our opinion the comity that should exist between state and federal legislative power prohibits our taking that ungracious and narrow view."

But we are unable to concur in the conclusion reached in these cases. The effect of the decisions is to make the statute speak from the time of its enactment instead of from the time it was made to become a law, thus giving it an effect that the power that enacted it did not give to it. Nor do we think there is any such question of comity involved as requires the courts to hold the state statutes inoperative. That Congress had entered the field of legislation on this subject, and that a state statute on the same subject could at most have but a short life, must indeed have been a persuasive argument before the state legislature against the passage of such an act, but it has no force in the courts. The court must take the statutes as it finds them, and can rightfully refuse to give them force only when they violate some positive principle of government laid down in the fundamental law. Statutes are not to be overturned on mere principles of comity.

The cases where this precise question is involved seem not to be many. Indeed the only one called to our attention, other than the two just referred to, where the direct question

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was presented is *Larrabee v. Talbott*, 5 Gill. (Md.) 426. By the seventeenth section of the bankruptcy act of 1841, which was passed on August 19 of that year, it was expressly provided that the act should take effect only from and after the first day of February, 1842. It was claimed that the insolvent laws of Maryland were superseded in their operation between the date of the passage of the act and the date it went into effect. The court denied the claim, using this language:

"The late bankrupt law of the United States was passed on the 19th of August, 1841; but it was expressly provided by the seventeenth section of the statute, that it should take effect only from and after the first day of February, 1842. This is equivalent to declaring that the Act should have no effect until that day; and therefore, there is no foundation for the point made by the counsel for the appellant; that the insolvent laws of Maryland were suspended in their operation by the Bankrupt Act of the United States, at the period when the proceedings of Rogers & Frick under those laws were commenced and consummated. At that time, the Bankrupt Act was not in force, and there could have been no conflict between the National and State legislation upon this subject.

"In *Ex parte Eames*, 2 Story Rep. 325, Mr. Justice Story said:

"That as soon as the Bankrupt Act went into operation, in February, 1842, it *ipso facto* suspended all action on future cases, arising under the state insolvent laws, where the insolvent persons were within the purview of the Bankrupt Act. I say future cases, because very different considerations would or might apply, where proceedings under any state insolvent laws were commenced, and were in progress before the Bankrupt Act went into operation. It appears to me, that both systems cannot be in operation, or apply at the same time to the same persons; and where the State and National legislation, upon the same subject, and the same persons, come in conflict, the National laws must prevail and suspend the operation of the State laws. This as far as I know, has been the uniform doctrine maintained in all the courts of the United States.' "

This decision seems to us more in consonance with correct

principles than the more recent cases above cited, and we follow it in preference to them.

The judgment is affirmed.

ALL CONCUR.

[No. 7882. Decided June 28, 1909.]

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellant, v. TACOMA RAILWAY & POWER COMPANY,
Respondent.¹

RAILROADS—CROSSING OTHER ROADS—FUTURE CONTINGENCIES—EXPENSE—DETERMINATION. Where, in proceedings by a railroad company to condemn the right to cross street railway tracks, the court determined that there was no present necessity for safety devices, it is improvident and error to order that the petitioner, or junior road, should pay the cost of safety appliances that might be required in the future by the city or any lawful authority.

Appeal from, and certiorari to review, an order of the superior court for Pierce county, Clifford, J., entered November 7, 1908, in favor of the defendant, adjudging a future necessity for the installation and maintenance of safety devices at a railway crossing, after a trial on the question of damages in a condemnation proceeding. Reversed.

H. H. Field and *Geo. W. Korte*, for appellant.

James B. Howe, *B. S. Grosscup*, and *R. G. Sharpe*, for respondent.

FULLERTON, J.—The appellant is a railway company engaged in the construction of a transcontinental railroad. The respondent is a street railway company operating lines of street railways in the city of Tacoma. On September 5, 1908, the appellant began this proceeding to condemn the right to lay, maintain, and operate its main tracks and appurtenant tracks over and across the tracks of the respond-

¹Reported in 102 Pac. 778.

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ent laid upon east D street, in the city of Tacoma. After notice to the respondent, a hearing was had on the application to condemn, before the superior court of Pierce county, at which hearing the respondent offered evidence tending to show that, in order to protect the public and avoid collisions and accidents, it was necessary to install some form of interlocking or other safety device at the place of crossing, and moved the court to direct that some such device be installed and maintained for all future time at the appellant's expense. The court refused to include this requirement in its order, but, at the conclusion of the hearing, entered the usual condemnatory order, annexing thereto, with the consent of the appellant, the following conditions, namely:

"First. Said Power Company shall have the right to retain the tracks now owned and operated by it at the point of crossing aforesaid as shown on the said plat attached to the said petition, and the said petitioner agrees that nothing shall be done, or suffered to be done by it that shall in any manner materially impair the usefulness of said existing tracks of the Power Company.

"Second. Said petitioner agrees that it will furnish the material for and construct and put in all crossing frogs and frog fixtures, rails and other structures necessary to make the crossing with the existing tracks of the Power Company at the point set forth and described in said petition and said plat attached thereto; all of said materials and the entire construction of said crossing to be furnished and done strictly in accordance with such reasonable plans and specifications as shall be prescribed by the Chief Engineer of said Power Company, but at the sole cost and expense of said petitioner. Said crossing shall be maintained and kept in good repair at the sole cost and expense of said petitioner. If said petitioner fails to make all such repairs and renewals within a reasonable time, when required by said Power Company, then said Power Company may make the same, and said petitioner agrees that in such case it will promptly refund and pay to said Power Company, the cost of such repairs and renewals.

"Third. In the event that overhead work is required of the said Power Company at said crossing, on account of the putting in of said crossing, said petitioner shall pay to said

Power Company, within 30 days after demand, a fair and just part of the cost and expense incurred by said Power Company in installing any overhead apparatus required by said crossing.

"Fourth. The foregoing conditions and agreements shall extend to and be binding upon the respective successors and assigns of the parties hereto."

The court also further directed that a jury be impaneled to ascertain the amount of damages, if any, that would accrue to the respondent by reason of the construction of the crossing tracks. On the day fixed for the trial of the question of damages, the parties appeared before the court, another judge presiding, and waived a jury trial. Thereupon the appellant offered evidence tending to show that, because of the conditions imposed on it in the decree of condemnation, the respondent would not be damaged at all by reason of the crossing. The respondent did not offer any evidence on the question of damages, but did offer and introduce, over the objection of the appellant, evidence tending to show the necessity of safety appliances and devices held not to be necessary at the first hearing, and asked the court to require their installation and maintenance at the cost of the appellant. The court refused to find that there was any immediate necessity for an interlocking device or other safety appliance at the point of crossing, and refused to enter a judgment requiring the construction of any such device, but did enter, in addition to a judgment for the damages, which it assessed at one dollar, the following:

"The court at this time in ascertaining and fixing said compensation in the sum of one dollar (\$1), in addition to requiring said crossing to be made by the petitioner under the provisions stipulated by the petitioner in its petition, adjudges that if and whenever, by reason of the tracks of the petitioner crossing the tracks of the Tacoma Railway and Power Company, at the place and in the manner shown in the petition and exhibit attached thereto, the City of Tacoma, or other competent authority, shall lawfully require a standard interlocking device, or other safety appliance or

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appliances, they shall be installed, maintained and operated at the cost of the petitioner herein but this provision shall not be construed as requiring the petitioner to pay or assume any portion of the expense of such interlocking device, or other safety appliance or appliances, which may be imposed by the City of Tacoma or other competent authority, upon the owners of any railroad tracks that may hereafter be constructed and maintained at said crossing or as precluding the petitioner from having contribution from such other owners for any portion of said expense."

It is this order the appellant seeks to review in this proceeding, bringing the judgment here both by appeal and writ of review.

Counsel, in their printed briefs and in their oral argument at bar, have discussed a number of questions which we do not feel called upon to notice specifically. The controlling principle has seemed to us to be comparatively simple. That part of the order complained of is both unnecessary and improvident. It is unnecessary because a proper determination of the rights of the parties does not call for its entry. After the court determined that there was no present necessity for interlocking or other safety devices, there was no requirement that it should attempt to provide for future contingencies. The necessary and proper order was one merely denying the application to require the immediate installation of a safety device. The order was improvident for the reason stated by us in *State ex rel. North Coast R. v. Northern Pac. R. Co.*, 49 Wash. 78, 94 Pac. 907. It attempts at this time to provide for contingencies which may arise in the future and which had better be left for regulation when they arise. As we said in that case, it may be that conditions will have so far changed at the time when the necessity for safeguards arise that it will be inequitable to require them to be installed at the appellant's cost. Moreover, to strike this part of the order can work no injustice to either party. If the right to have the cost of installation of these devices charged to the junior road be absolute, it

will be as absolute when the necessity for their installation arises as it is at the present time, in which event the junior road will be required to install them; while, on the other hand, if equitable principles may be allowed to intervene in the determination of the question, it is manifest that great injustice might be done the junior road by an order now fixing upon it irrevocably the burden of installing and maintaining the devices at its own cost.

The order appealed from will be reversed, and the cause remanded with instructions to enter an order omitting the clause to which exception is taken.

RUDKIN, C. J., GOSE, MOUNT, CROW, and DUNBAR, JJ., concur.

CHADWICK, J. (concurring).—I concur in the result, but I am unwilling to subscribe to the expression that the rights and obligations of railroads with reference to crossings and the maintenance of safety appliances can be determined as a matter of equity. It is a subject which should, and from the nature of things must, depend upon the exercise of legislative will. This point was not made by counsel in the case of *State ex rel. North Coast R. v. Northern Pac. R. Co.*, reported in 49 Wash. 78, 94 Pac. 907, and I feel that the question should remain open. While an interlocking switch in some situations might be a proper device, its location and operation in the streets of a city, where its use would result in greater danger to life and property than a grade crossing, would not be tolerated. The rights and obligations of the companies are mutual, and owing to the public, and the hope that a court will at some future time require that safety appliances will be installed and operated at the expense of the junior road should not be held out. There is not much authority upon this subject, it is true, but the observations made in *Arkansas etc. R. Co. v. St. Louis etc. R. Co.*, 103 Fed. 747, seem to sustain my opinion.

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[No. 8108. Department One. June 29, 1909.]

A. W. PRIMLEY, *Respondent*, v. ELBE LUMBER & SHINGLE
COMPANY, *Appellant*.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REMEDY—INCOMPETENT CO-SERVANTS. An action by a sawyer for injuries sustained through the negligent employment of an incompetent co-servant as a setter does not fall within the rule that a servant does not assume the risks where he continues in the service on the promise of the master to remove the danger, where it appears that the co-servant C., represented to be an "apt fellow," was to be tried for a couple of days, and if he did not make good another man was to be sent, and the sawyer merely objected to C. as incompetent, stating that it would save time and lumber to have another man; since the anticipated injury was not personal to the sawyer.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered January 14, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Reversed.

F. S. Blattner, L. F. Chester, and L. B. da Ponte, for appellant.

Govnor Teats, Hugo Metzler, and Leo Teats, for respondent.

MORRIS, J.—The respondent was in the employ of the appellant as head sawyer, and on the 23d of May, 1908, was injured. The negligence complained of was in the employment by appellant of one Coombs as a setter, it being alleged that respondent, knowing Coombs was incompetent and inexperienced as a setter, objected to working with him, but that he was induced to continue by reason of the promise of the appellant that, if Coombs proved incompetent, another setter would be procured, and that, relying upon this promise, respondent continued in his employment until his injury, some time in the afternoon of the same day.

¹Reported in 102 Pac. 763.

The whole case hinges on whether the case falls within the rule contended for by respondent: That knowledge of the danger does not, in case of injury, preclude a recovery by the servant, where the master promises to remedy the defect or remove the danger, and the servant continues in the employment expressly relying upon this promise. The establishment of such a rule requires no citation of authority. It has become settled, as one of the wholesome principles of the law. It is necessary, therefore, to examine so much of the record as touches this point to ascertain if the case before us is a proper one for the application of such rule. The respondent had gone to the mill office to look over the orders to be cut, and while there, as he testifies, the following conversation with the foreman of appellant occurred:

"I said: 'We haven't any setter for that'; and he said: 'How about Coombs? He's a pretty apt fellow; we'll put him on.' I said: 'Did he ever work on the carriages?' Well, he did not know, but he would catch on pretty quick. I said: 'You better telephone for a setter; it will save time for the company and probably save lumber'; but he said: 'We will try Coombs anyway for a couple of days, and if he don't make good, we will send for another man'."

The next conversation concerning Coombs was after the work had commenced. Respondent says that the foreman came there a little while before the accident,

"and I told him then, that he better get another setter. He said: 'Oh, Hell, give him a chance; he hasn't had any chance to learn anything yet,' and I said: 'It will be a long time before he will learn.' But he said: 'No, Hell, we will try him out yet; he will catch on.'"

On cross-examination he extends this conversation by adding:

"I said: 'If you are going to put us on that log, you better get a setter. There are a couple of other fellows that know about setting, why not put them on? Dell Ackley is pretty good and also that Billy Hoffman would do.' He said: 'We want Ackley to run the edger. He could do it,

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but he has enough to tend to,' and he wanted Billy on the log deck. He said: 'We have no use for Coombs at the edger, and we will put him on there'."

This is all the testimony disclosed by the record concerning the placing of Coombs as the setter. Respondent then relates how, after working some time, seeing that Coombs did not understand the signals, he walked over and showed him the figure 3 upon the dial, which was the proper point for the set, in the size it was then desired to saw; but Coombs, notwithstanding this, set about a third of an inch past the figure, and the cant began to turn over, and while attempting with a peavey to "pry it in," as he says, it turned against him, causing the injury.

If we should concede that the testimony was sufficient to justify a finding that respondent was in danger because of the inexperience or incompetency of Coombs, and that the peril of the situation was called to the attention of appellant, we can find in this evidence no promise on the part of the appellant to remove this danger or provide any remedy for this peril. The first assertion by the master as to Coombs was that, "He's a pretty apt fellow. We will put him on . . . he would catch on pretty quick." There does not seem to be any inducement here held out to the respondent to work with an inexperienced man temporarily, upon a promise to substitute in the near future, or at any other time, a man of knowledge, fitness, and experience. It would rather go to show that the appellant thought Coombs could do the work with reasonable satisfaction, and was to be kept on the job. The next statement by appellant is: "We will try Coombs anyway, for a couple of days, and if he don't make good, we will send for another man"; no concession of Coombs' ability or lack of it, but an expressed purpose to put him on the job in order to see "if he don't make good"; no promise to procure another man for the work, unless it was the conjectural one, "if he don't make good"; no re-

questing respondent to hold on temporarily until appellant could procure a setter. The only suggestion of "another man" was in case Coombs did not make good, which at that time the appellant did not seem willing to admit. The same is true of the third suggestion, as to the incompetency of Coombs. The reply then was to give him a further chance and he would yet "catch on." Moreover, any reliance on the part of respondent that appellant would get another man in Coombs' place must have been destroyed when it appeared that there were two men then in the mill, Ackley and Hoffman, who were competent to act as setters, but when asked to put on these men, appellant refused to do so, but insisted on keeping Coombs at work. This was an indication of no present intention or purpose to obtain another setter. We look in vain through this evidence for any promise to obtain a better man, and a remaining at work with a reliance upon such promise. Neither is there in the case any expression of an intention or purpose to quit work on the part of respondent, nor a continuance, relying upon the substitution of an experienced setter.

While we are aware some authorities have gone to the extent of holding that there need be no expressed complaint, but that any act or expression by which the servant gives the master to understand that he is unwilling to continue in the employment, unless the apprehended cause of danger is removed, constitutes a sufficient complaint, and any act or expression by which the master gives the servant to understand that the cause of danger will be removed constitutes a sufficient promise (Labatt, Vol. 1, p. 1185); yet, reluctant as we are to disturb this verdict because of insufficiency of evidence, we can find no expressed nor implied complaint of danger to himself, nor any objection to continuing in the employment on the part of respondent, and no act or expression on the part of appellant which would justify us in holding that it promised to relieve respondent from the dangers of any situation which it, or even respondent himself,

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believed to be imminent because of Coombs. All the cases wherein the doctrine contended for by respondent is maintained hold that, in order to relieve the servant from the operation of the doctrine of assumed risk from a defect complained of, the danger from which he was no longer willing to assume, it is essential that his remaining in the employment be induced by the promise of the master to remedy the defect, and that otherwise he would not have done so; and many of these cases hold that the only application of the principle is to tools, appliances, and machinery which are found to be defective. *Showalter v. Fairbanks, Morse & Co.*, 88 Wis. 376, 60 N. W. 257.

But, conceding the application of the rule for the purpose of respondent's contention of negligence, we cannot find in the testimony the essential elements calling for its announcement. It is suggested by appellant that respondent's objection to working with Coombs, if he did object, was not made upon the ground of his personal safety, but rather that Coombs' inexperience would cause loss of time, labor, and material; the objection being because of the effect upon the general employment, and not any fear of injury to himself. The evidence justifies this contention. The only ground of objection made to Coombs was in the first interview, when respondent said to the foreman of appellant: "You better telephone for a setter; it will save time for the company and probably save lumber." While it is commendable for a servant to thus guard the interests of his employer, the injury or damage anticipated, upon the ground of which he complains, must be one personal to himself. The effect upon him, and not upon his employer, is the test. *St. Louis & S. F. R. Co. v. Mealman* (Kan.), 97 Pac. 381; *Lewis v. N. Y. & N. E. R. Co.*, 153 Mass. 73, 26 N. E. 431, 10 L. R. A. 513; *Bodwell v. Nashua Mfg. Co.*, 70 N. H. 390, 47 Atl. 613.

In *Industrial Lumber Co. v. Johnson*, 22 Tex. Civ. App. 596, 55 S. W. 362, the court says, in speaking of this rule,

that the removal of the dangerous condition must be as a protection to the servant. In the case before us, respondent neither complained of his own risk nor asked for protection. He said nothing calling in question the appellant's duty to himself. Failing in this, his recovery does not fall within any rule of law.

The judgment is reversed, with instructions to the court below to dismiss the action.

RUDKIN, C. J., FULLERTON, GOSE, and CHADWICK, JJ., concur.

[No. 7838. Decided June 29, 1909.]

BARTHOLOMEW COUGHLIN, *Respondent*, v. LULU A. HOLMES
et al., *Appellants*.¹

APPEAL—REVIEW—PRESUMPTIONS—TAXATION—REDEMPTION—TENDER. Where the record in an action to set aside a tax foreclosure shows that a tender of taxes was made and paid into court, in the absence of a statement of facts or showing to the contrary, it will be presumed on appeal that the complaint was amended to allege the tender and proof made as required by Bal. Code, §§ 5678, 5679.

TAXATION—TAX SALE—VALIDITY—PURCHASE BY OFFICER. A sale of land for taxes by a county treasurer to a deputy in his office is void as against public policy.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered April 25, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Harris Baldwin, for appellants.

William S. Lewis, for respondent.

MOUNT, J.—Plaintiff brought this action to quiet title to certain real estate in Spokane county. The plaintiff alleged

¹Reported in 102 Pac. 772.

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title under mesne conveyances extending back to the United States, and, also, that at the time he purchased the property, viz., on April 24, 1906, the land was unimproved, vacant land; that the property was purchased from the record owner for a valuable consideration, without notice of any other claim or incumbrance thereon; that after purchase the plaintiff took possession and made valuable improvements upon the property, and paid all the taxes subsequent to the year 1903. The complaint also alleged that the defendants made a claim of title by virtue of certain tax foreclosure proceedings, wherein the county treasurer at a tax foreclosure sale, on March 20, 1903, sold the land in controversy to defendant Emmett H. Holmes, who bid it in for the sum of \$1.40; that at the time of the sale the defendant was a deputy in the office of the county treasurer; that thereafter while the defendant Emmett H. Holmes was still a deputy in the treasurer's office, a tax deed was issued to Lulu A. Holmes, wife of said Emmett H. Holmes, but that the said deed was not placed of record until June 14, 1906, and plaintiff was not informed thereof until July, 1907; that from the time of the tax sale in 1903, the defendants stood by and permitted the plaintiff to take possession, to make valuable improvements, and pay the taxes upon the property, without notice of any adverse claim until July, 1907.

The complaint did not plead a tender to the defendants of taxes paid by them upon the property. The defendants filed an answer, denying the allegations of the complaint, except those relating to the tax sale and deed issued thereunder. The cause was tried to the court without a jury. At the close of the evidence, the defendants moved the court to dismiss the action, for the reason that the complaint did not allege and the evidence did not show a tender to the defendants of the amount of taxes, penalties, interest, and costs paid by them in procuring the tax deed mentioned. This motion was denied, and final judgment was entered quieting

title in the plaintiff. The defendants have appealed from that decree.

No statement of facts is brought here. The appellants rely solely upon the position that it is necessary under the provisions of §§ 5678 and 5679, Bal. Code (P. C. §§ 8733, 8734), to plead and prove a tender of all taxes, penalties, interest, and costs justly due and unpaid upon such land before there can be a recovery in this case. In the case of *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751, we held that the owner of land sold for delinquent taxes could not maintain an action to quiet title without tendering to defendant the amount paid by him on account of such delinquent taxes, and it is true that the complaint in this case does not allege such tender. But we have frequently held that pleadings may be amended at the trial to conform to the evidence introduced, without objection. *Peterson v. Barry*, 50 Wash. 361, 97 Pac. 239; *Cunningham v. Lakin*, 50 Wash. 394, 97 Pac. 447. The record before us shows that a tender was made and the amount thereof paid into court. The statement of facts was not brought here, and it is not shown that the complaint was not amended in this respect, or that the proof was not made. In order to reverse this case, we must assume that the complaint was not amended and that no proof of tender was made. We may assume facts to support a judgment, but we must not assume facts against the judgment. Error must affirmatively appear. *Sellers v. Pacific Wrecking & Salvage Co.*, 34 Wash. 111, 74 Pac. 1056.

Furthermore, we are of the opinion that the judgment may be sustained upon the ground that the sale of the land by the county treasurer to himself or a deputy in his office is against public policy, and therefore invalid. *Sponable v. Woodhouse*, 48 Kan. 173, 29 Pac. 394.

The judgment must therefore be affirmed, and it is so ordered.

RUDKIN, C. J., CROW, DUNBAR, FULLERTON, GOSE, and MORRIS, JJ., concur.

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[No. 7731. Decided June 30, 1909.]

HANNAH E. DOUGLAS, *Appellant*, v. GEORGE W. TELLER,
Administrator of the Estate of Hiram L. Douglas,
*Deceased, Respondent.*¹

JUDGMENTS—DIVORCE—FAILURE TO RECORD—EFFECT—CERTIFICATE. The failure of the clerk of a foreign court to perform the clerical duty of recording a judgment of divorce, as required by statute to make the judgment effective, does not affect its validity, and a certificate of the clerk that it was not recorded, contradicting a former certificate that it was recorded, is therefore properly disregarded.

DIVORCE—FOREIGN DIVORCE—VALIDITY—DOMICILE—COMITY. The courts of this state will, on the principal of comity, recognize the validity of a divorce granted by the courts of a sister state, to a husband who was for three years a resident in such state, although it is based on a substituted service and the matrimonial domicile was in another state; the divorce having been granted forty years ago and the wife having had notice thereof.

DIVORCE—VALIDITY—FRAUD—SUBSTITUTED SERVICE—NAME OF DEFENDANT. A foreign judgment of divorce obtained on substituted service against Elizabeth D. is not void as a fraud upon the defendant, whose true name was Hannah Elizabeth D., where there was evidence that she was commonly known by the former name.

Appeal from an order of the superior court for Spokane county, Sullivan, J., entered March 31, 1908, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, denying a petition for the removal of an administrator. Affirmed.

A. H. Gregg, P. S. McNutt, J. C. Kleber, and P. R. Heily,
for appellant.

W. J. Parks and Danson & Williams, for respondent.

MOUNT, J.—This action was brought by the appellant for the removal of respondent as administrator of the estate of Hiram L. Douglas, deceased. After a trial, the court en-

¹Reported in 102 Pac. 761.

tered an order denying the appellant's petition, and this appeal followed from that order.

The main issue in the case was whether the appellant was the wife of the deceased at the time he acquired certain real estate in this state. It appears that the appellant and Hiram L. Douglas were married in the state of Michigan in the year 1853 or 1854. They lived together for four or five years. The only living issue of the marriage is Mary E. Teller, who is now the wife of the respondent, George W. Teller. In the year 1858, Hiram L. Douglas and the appellant separated. They lived thereafter in the same vicinity until about the year 1863, when Mr. Douglas removed to the state of Illinois. Thereafter, in the year 1866, Mr. Douglas brought an action for divorce in the circuit court of Macon county, Illinois, a court of general jurisdiction, and alleged as ground therefor that Mrs. Douglas had wilfully abandoned him. Service was had by publication of summons. Appellant did not appear to defend the action and, after evidence taken, a divorce was granted at the "February term, 1867." On the 2d day of April, 1867, the clerk of said circuit court of Illinois furnished a copy of the decree to Mr. Douglas, certifying "that the foregoing is a true and perfect copy of a decree entered in a certain cause by the circuit court of Macon county aforesaid, at the February term, A. D. 1867, of said court, wherein Hiram L. Douglas filed his bill of complaint against Elizabeth Douglas for divorce, said copy having been made from the records of said court in my office." Thereafter the said Hiram L. Douglas came to the state of Washington and, in 1888, acquired certain real estate in Spokane county. He died in the year 1890. In 1891, respondent was appointed administrator of his estate. In 1907, the appellant brought this action to remove the respondent as administrator. The clerk of the circuit court of the state of Illinois for the county of Macon, in August, 1907, furnished to appellant a copy of the record in *Douglas v. Douglas*, "as the same appears from

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the record and files in said cause now in this office." The certificate also contained the following:

"I further certify that, through an omission or error of the clerk, the order of the court entered on the 19th day of the term was never properly transcribed on the record of the proceedings of that term, but upon the 19th day the following order was entered by the clerk. Cause heard. Decree."

Later the same clerk issued a certificate as follows:

"State of Illinois, County of Macon.

"I, John Allen, clerk of the circuit court and *ex-officio* recorder of deeds, in and for the county of Macon, state of Illinois, do hereby certify that as clerk of the circuit court I am the custodian of all the records and files thereof and as such clerk of the circuit court do certify the foregoing to be a true, perfect, and complete copy of what purports to be a decree in the case number 5243, where Hiram L. Douglas is complainant and Elizabeth Douglas is defendant, as same appears from the record and files in said cause now in this office in manner and form as herein described. The same is unsigned and never did bear the signature of the presiding judge and never was recorded or filed. About January 1st, 1908, I caused the said decree to be transcribed upon the records of the proceedings of the circuit court of Macon county, and the same is now transcribed at length in Book 49 at page 220 of the records of the proceedings of the circuit court of Macon county. I further certify that I caused the said decree to be transcribed but no order of court directing me to transcribe said decree was ever made or entered. The judge of the circuit court who heard the cause and the clerk who was at that time clerk of the circuit court are long since dead.

"In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court at my office at Decatur, Illinois, this 17th day of February, A. D. 1908.

"John Allen,

"Clerk of the Circuit Court and Ex-Officio Recorder of Deeds."

All these certificates were introduced in evidence, but the court refused to consider the last certificate above copied. It

is contended by the appellant that the decree of divorce was void, (1) because it was not entered or filed of record when it was rendered; (2) because the court had no jurisdiction of the appellant, and (3) because the decree was obtained by fraud.

Conceding that, under the statutes of Illinois, a decree is not effective until it is entered and recorded, and also that these certificates are competent to prove the facts, the certificate first issued shows such facts, for it says: "The foregoing is a true and perfect copy of a decree *entered* . . . having been made from the *records*." It is true the certificates issued later contradict the earlier one, to the effect that the decree was recorded and filed, but the certificates taken together clearly show that this result was by omission or error of the clerk. The duty of the clerk was a clerical duty, and his neglect or omission did not, and could not, avoid the decree, which is clearly proven to have been made. The trial court was, therefore, justified in disregarding the later certificate and in considering that as done which ought to have been done.

Appellant next contends that the courts of Illinois had no jurisdiction to grant the decree of divorce upon substituted service, because the matrimonial domicile of the parties remained in the state of Michigan with the wife, and therefore the Illinois decree is not entitled to full faith and credit in this state. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, is relied upon to support this doctrine. It is probably true that this court would not be bound by the Illinois judgment, but clearly the courts of this state, as a matter of comity, may recognize the Illinois decree, under the rule of *Haddock v. Haddock*, *supra*. *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079.

The record in this case shows that Mr. Douglas had been a resident of Illinois some three years prior to the time he brought his action for divorce, and under the law of that state the court had jurisdiction of the case *in rem*. The di-

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vorce was granted more than forty years before this action was begun. It is true, the appellant testified that she did not know of the divorce until long after the death of Mr. Douglas, and only a few months prior to the bringing of this action. This statement, however, is contradicted by the daughter, who testified that she and her mother had discussed the fact of divorce many years ago. Under these circumstances the decree at this late date ought to import verity, especially where it is a valid decree where rendered.

Appellant also insists that the decree was obtained by fraud, by reason of the fact that the action was brought against appellant under the name of Elizabeth Douglas, when her true name was Hannah Elizabeth Douglas and that the action was based upon abandonment by the wife, while the fact was that Mr. Douglas abandoned the appellant. The evidence shows, and the court found, that the appellant was commonly known by the name of Elizabeth Douglas. Service by that name was therefore sufficient. There was evidence offered in this case to show that Mr. Douglas was at fault and abandoned his wife. The evidence taken in the divorce case, which was preserved and certified in the record, shows the opposite. We are not inclined to disturb the judgment of the trial court upon this state of the evidence, especially where the judgment is of such long standing and where one of the parties to it is dead.

We find no error in the record, and the order appealed from is therefore affirmed.

ALL CONCUR.

[No. 7357. Decided May 28, 1909.]

WASHINGTON DREDGING & IMPROVEMENT COMPANY, *Appellant*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered November 30, 1907. Affirmed.

Shepard & Flett, Thomas M. Vance, and Will H. Thompson, for appellant.

G. E. de Steiguer et al., for respondents. See *ante* p. 346.

PER CURIAM.—This action involves the same issues, judgment, and assignments of error as No. 7358, in which an opinion has been filed on this date, *ante* p. 346, 101 Pac. 884. On the authority of that opinion, the judgment is affirmed.

[No. 7743. Decided June 28, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Chicago, Milwaukee & St. Paul Railway Company, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al.*, *Respondents*.²

Certiorari to review an order of the superior court for King county, Gilliam, J., entered October 7, 1908. Reversed.

H. H. Field and *Geo. W. Korte*, for relator.

James B. Howe, A. J. Falknor, and R. G. Sharpe, for respondents.

PER CURIAM.—The question in this case is substantially identical with that submitted in the case of *Chicago, Milwaukee etc. R. Co. v. Tacoma R. & P. Co.*, *ante* p. 682, 102 Pac. 778, and for the reasons therein stated the order sought to be reviewed is reversed, with instructions to enter a new order of condemnation in the form of the first order, omitting its fifth condition.

¹Reported in 101 Pac. 885.

²Reported in 102 Pac. 780.

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- Between members and corporation, see **CORPORATIONS**, 1-3.
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- Breach of covenants of warranty, see **COVENANTS**.
- Right of plaintiff to voluntary nonsuit, see **DISMISSAL AND NONSUIT**.

ACTION—CONTINUED.

For divorce, see **DIVORCE**.

Recovery of real property, see **EJECTMENT**.

Election of remedy, see **ELECTION OF REMEDIES**.

Taking of or injury to property in exercise of power of eminent domain, see **EMINENT DOMAIN**.

Suits in equity, see **EQUITY**.

Recovery of real property wrongfully withheld, see **FORCIBLE ENTRY AND DETAINER**.

Setting aside fraudulent conveyances, see **FRAUDULENT CONVEYANCES**.

Injuries from defect or obstruction in highways, see **HIGHWAYS**.

Right of wife to sue for personal injuries, see **HUSBAND AND WIFE**, 2.

On contract of indemnity, see **INDEMNITY**.

By or against infants, see **INFANTS**.

On insurance policy, see **INSURANCE**.

Cancellation of judgment, see **JUDGMENT**, 2-5.

Bar by former adjudication, see **JUDGMENT**, 2, 6-9.

By servant for personal injuries, see **MASTER AND SERVANT**.

Recovery of refund on excessive payment of assessment, see **MUNICIPAL CORPORATIONS**, 17-21.

By or against firms, see **PARTNERSHIP**.

By or against receivers, see **RECEIVERS**.

For price of goods sold, see **SALES**, 3.

Breach of warranty, see **SALES**, 4, 5.

Foreclosure of tax lien, see **TAXATION**, 5-11.

Setting aside tax sale or judgment, see **TAXATION**, 10, 11.

By purchaser for rescission of contract for sale of land, see **VENDOR AND PURCHASER**, 4-7, 15.

Recovery of price paid for land, see **VENDOR AND PURCHASER**, 15, 16, 19, 20.

By or against warehousemen, see **WAREHOUSEMEN**.

Enjoining obstruction of natural water course, see **WATERS AND WATER COURSES**.

ADJOURNMENT:

Of hearing on assessment for sewers, see **MUNICIPAL CORPORATIONS**, 7.

ADOPTION:

By city of initiative and referendum plan of government, see **MUNICIPAL CORPORATIONS**, 1-3.

Of city ordinance, see **MUNICIPAL CORPORATIONS**, 4.

ADVERSE POSSESSION:

1. **ADVERSE POSSESSION—PAYMENT OF TAXES—COLOR OF TITLE—SHERIFF'S CERTIFICATE OF SALE.** A sheriff's certificate of sale upon mortgage foreclosure, delivered to the purchaser, is color of title, and with payment of taxes for seven years, in good faith, constitutes a title by adverse possession of vacant and unoccupied lands, as against the foreclosure defendants, and also their wives who were

ADVERSE POSSESSION—CONTINUED.

not made parties to the foreclosure, where they all had acquiesced in the decree, and had not been in possession, or paid any taxes, or made any claim to the land, for twelve years. *Goetter v. Moore* 5

2. **ADVERSE POSSESSION—HOSTILE CHARACTER—PERMISSIVE USE—JUDGMENT—VACATING DEFAULT—EJECTMENT.** Occupancy of a \$12 shack for nearly twenty years on a railroad company's premises by an old employee, who had no deed and had paid no taxes, appears to have been merely permissive as a squatter; and in ejectment it is not an abuse of discretion to refuse to vacate a default judgment on such a showing. *Northern Pac. R. Co. v. Devine*..... 241

3. **ADVERSE POSSESSION—PAYMENT OF TAXES—SUCCESSIVE PAYMENTS.** Under Bal. Code, § 5504, providing for the acquisition of title to vacant and unoccupied land by the payment, under color of title, of all taxes for seven successive years, the taxes must be paid continuously each successive year. *Seymour v. Dufur*..... 646

AFFIDAVITS:

As part of record on appeal, see **APPEAL AND ERROR**, 11.

AGENCY:

See **PRINCIPAL AND AGENT**.

AGREEMENT:

See **CONTRACTS**.

ALIMONY:

In action for divorce, see **DIVORCE**, 3-5.

ALTERATION OF INSTRUMENTS:

See **FORGERY**.

AMBIGUITIES:

Parol evidence to explain, see **EVIDENCE**, 5.

AMENDMENT:

On appeal or writ of error, see **APPEAL AND ERROR**, 20-24.

Of franchise ordinance at time of passage, see **MUNICIPAL CORPORATIONS**, 4.

Of pleading, see **PLEADING**, 2.

ANIMALS:

Carriage of live stock, see **CARRIERS**, 3-5.

Larceny of, see **LARCENY**, 1, 3.

APPEAL AND ERROR:

- Appearance on appeal as waiver of objection to jurisdiction, see **APPEARANCE**, 2.
- Costs on reversal, see **COSTS**.
- Increase in number of judges and provision for separate departments of supreme court, see **COURTS**.
- Condemnation proceedings, see **EMINENT DOMAIN**, 3, 10.
- Review in criminal prosecution, see **CRIMINAL LAW**, 5-7; **FORGERY**, 4.
- Questions considered on appeal from order adjudging public necessity for condemning street, see **MUNICIPAL CORPORATIONS**, 16.
- Remedy by appeal or writ of error as barring prohibition, see **PROHIBITION**.
- Right of stockholders to appeal from compromise by receiver, see **RECEIVERS**.
- Scope of evidence in rebuttal and admission in rebuttal of evidence proper in chief, see **TRIAL**, 1.
- Depositions in jury room as harmless error, see **TRIAL**, 6.

III. DECISIONS REVIEWABLE.

1. **APPEAL—DECISIONS APPEALABLE—FINAL ORDERS.** An order directing the execution of a deed pursuant to a decree of divorce distributing property, is appealable as a final order affecting a substantial right. *Lowe v. Lowe*..... 50
2. **APPEAL—DECISIONS APPEALABLE—CONTEMPT—COSTS.** An order adjudging a party in contempt and requiring the payment of certain costs is appealable under Bal. Code, § 5811. *Drainage District No. 1 v. Costello* 67

IV. RIGHT TO APPEAL.

3. **APPEAL—REVIEW—DISMISSAL—CESSATION OF CONTROVERSY.** The dismissal of an appeal carries with it the supersedeas granted therein; and hence an appeal from an order denying a motion to vacate the supersedeas will be dismissed, as the controversy has ceased. *Masoero v. Campbell & Co*..... 583
4. **APPEAL—REVIEW—RIGHT TO APPEAL—ESTOPPEL.** That the appellant, after an announcement of an erroneous conclusion of law therein, duly excepted to, prepared the findings, conclusions, and judgment in accordance with the decision, does not preclude him from appealing therefrom on the theory that he invited the error, having contested the matter all the way. *Eby v. Larkin*..... 454
5. **APPEAL—NECESSARY PARTIES—NOTICE.** A trustee appointed to hold the title to property for the benefit of children, who did not appear in the action, is not a necessary party to an appeal upon whom notice of appeal is to be served. *Lowe v. Lowe*..... 50

APPEAL AND ERROR—CONTINUED.

V. PRESERVATION OF GROUNDS.

6. APPEAL—PRESERVATION OF GROUNDS—OBJECTION. Error cannot be alleged in the consolidation of actions for trial, or to allowing amendments to conform to the proofs, where the record shows that no objections were made below. *Ness v. Bothell*..... 27
7. APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error cannot be assigned on the judge's comment on the evidence, where the remarks were addressed to counsel during the trial and no exceptions were taken. *Peyser v. Western Dry Goods Co.*..... 633
8. APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—STATING REASONS—ASSIGNMENT OF ERRORS. Where an exception to an instruction that a street railway company owes the highest degree of care to avoid injury to one who is about to become a passenger is excepted to because it "did not leave to the jury the question whether the plaintiff presented herself at the proper time and place," error cannot be assigned thereon for the reason that the company owes such degree of care only to persons who had already become passengers, notwithstanding that it was unnecessary to state the reasons for the exception under Bal. Code, § 5053. *Harkins v. Seattle Electric Co.* 184

VII. REQUISITES FOR TRANSFER.

9. APPEAL — NOTICE — TIME FOR TAKING — TAXATION — FORECLOSURE PROCEEDING. Laws 1903, p. 75, § 4, requiring an appeal to be taken from a judgment in a tax foreclosure case within thirty days, has no application to appeals from judgments in independent actions in equity to set aside a tax foreclosure judgment and sale and to quiet title, which must be taken within ninety days. *McCausland v. Bailey*, 51 Wash. 183, overruled. *Gould v. Knox*..... 248

X. RECORD.

10. APPEAL—RECORD—STATEMENT OF FACTS—REVIEW—EVIDENCE. The judgment will not be disturbed on questions of fact in an equity case, where the certificate to the statement of facts shows that all of the evidence which was before the lower court is not brought up on appeal. *Ness v. Bothell*..... 27
11. APPEAL—STATEMENT OF FACTS—AFFIDAVITS—CONTINUANCE. An appeal will be dismissed where the only error assigned is in the refusal to grant a continuance, and the affidavits used are not brought up for review by a bill of exceptions or statement of facts. *State v. Lee Wing Wah*..... 294

XI. BRIEFS.

12. APPEAL—DISMISSAL—BRIEFS—FILING. An appeal will not be dismissed because the briefs are filed one day too late. *Campbell v. Order of Washington*..... 398

APPEAL AND ERROR—CONTINUED.

XVI. REVIEW.

13. APPEAL—REVIEW—THEORY OF TRIAL BELOW—JUDGMENT—MOTIONS—ESTOPPEL. Where parties have insisted on treating their petition as a complaint in intervention, after their right to intervene was challenged, they cannot, for the first time in the supreme court, have it considered as a motion or petition to vacate a judgment, long after the time for such proceedings had expired; as the cause must be considered on appeal on the theory adopted below. *Seattle & Northern R. Co. v. Bowman*..... 416
14. APPEAL—REVIEW—WAIVER OF ERROR—THEORY OF TRIAL BELOW. The overruling of a demurrer to a complaint for rescission of a land contract and for damages, cannot be assigned as error so far as the action for damages is concerned, where the parties treated the action from the beginning as one in equity to rescind the contract and tried the case solely upon that theory. *Snarski v. Washington State Colonization Co.* 221
15. APPEAL—REVIEW—ERRORS REVIEWABLE. Upon appeal from the denial of a voluntary nonsuit to which plaintiff was entitled as a matter of right, plaintiff cannot have a review of error of law occurring at the trial; since his remedy by nonsuit and a new action is complete. *McPherson v. Seattle Electric Co.*..... 358
16. APPEAL—REVIEW—REASONS FOR DECISION. Where the sustaining of a demurrer was correct on any ground, the decision will be affirmed. *Hartig v. Seattle*..... 432
17. APPEAL—REVIEW—WAIVER OF ERROR. Error in refusing a nonsuit is waived by putting in evidence in defense. *Cleary v. General Contracting Co.* 254
18. APPEAL—REVIEW—ESTOPPEL TO ALLEGE ERROR—STIPULATIONS. After a stipulation compromising the amount due "for the purposes of this judgment," a party cannot allege error thereon on the theory that the stipulation had no effect on a judgment in the supreme court. *Spencer v. Alki Point Transportation Co.*..... 77
19. APPEAL—REVIEW—CROSS-APPEALS—ERRORS ALLEGED BY RESPONDENT. Upon appeal by plaintiff from the erroneous denial of a nonsuit, the defendant cannot by a cross-appeal secure a review of the merits, as the court was without jurisdiction except to grant the nonsuit. *McPherson v. Seattle Electric Co.*..... 358
20. APPEAL—REVIEW—PLEADINGS—AMENDMENTS. In an equity case tried *de novo* on appeal, it is not error to permit the amendment of the answer to conform to proof received without objection. *Ness v. Bothell* 27
21. APPEAL—PLEADINGS—AMENDMENT—INSURANCE. An answer in an action on a beneficiary certificate will be deemed amended to conform to proof received without objection as to a nonliability clause not pleaded in full. *Campbell v. Order of Washington*..... 398

APPEAL AND ERROR—CONTINUED.

22. APPEAL—REVIEW—TRIAL—AMENDMENT OF PLEADINGS. Where evidence is admitted without objection as to matters outside the issues, and the defendant was not misled and asked no continuance, the complaint will be deemed amended on appeal to embrace the matters in proof. *Peyser v. Western Dry Goods Co.*..... 633
23. APPEAL—REVIEW—PRESUMPTIONS—TAXATION—REDEMPTION—TENDER. Where the record in an action to set aside a tax foreclosure shows that a tender of taxes was made and paid into court, in the absence of a statement of facts or showing to the contrary, it will be presumed on appeal that the complaint was amended to allege the tender and proof made as required by Bal. Code, §§ 5678, 5679. *Coughlin v. Holmes*..... 692
24. APPEAL—REVIEW—PLEADINGS—AMENDMENTS—DISCRETION. The refusal of a trial amendment to the complaint will not be disturbed where no abuse of discretion is shown. *Lawson v. Black Diamond Coal Mining Co.* 614
25. APPEAL—REVIEW—VERDICTS. A verdict supported by conflicting evidence will not be disturbed on appeal. *Georig v. Peterson*.. 183
26. APPEAL—REVIEW—FINDINGS. Findings will not be disturbed because contrary to the undisputed evidence of an interested party where the same was not reasonable or in harmony with established facts, and the trial judge had opportunity to pass upon his credibility. *Brown & Bros. Mercantile Co. v. Sherrod*..... 132
27. APPEAL—REVIEW—FINDINGS. In an action to foreclose a lien, findings on absolutely conflicting testimony, supported by sufficient evidence, will not be disturbed on appeal. *Bock v. Sorenson*..... 558
28. APPEAL—REVIEW—FINDINGS. In an equity case tried *de novo* on appeal, the supreme court is not bound by the findings of the trial court. *Cushing v. Heuston*..... 379
29. APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error in the admission of evidence in an equitable case is harmless. *Hastie v. Jenkins* 21
30. APPEAL—REVIEW—HARMLESS ERROR—WITNESSES—IMPEACHMENT. It is not prejudicial error to sustain objections to questions tending to impeach a party's own witness, claimed to be prejudiced, where he had in effect fully answered a similar question, and the facts were otherwise established so that his evidence would not have changed the result. *State Bank of Washington v. Spokane-Columbia River R. and Navigation Co.*..... 528
31. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—MATTERS OTHERWISE ESTABLISHED. In an action triable *de novo* on appeal it is harmless error to exclude evidence to negative authority to employ a broker, where the excluded evidence is in the record, and without regard thereto an authorized employment was subsequently made. *Lawson v. Black Diamond Coal Mining Co.*..... 614

APPEAL AND ERROR—CONTINUED.

32. APPEAL—REVIEW—HARMLESS ERROR. A tax foreclosure judgment against a lot not in existence is without prejudice to the defendant. *Sound Investment Co. v. Bellingham Bay Land Co.*..... 470
33. SAME—TRIVIAL AMOUNT. Error in assessing cost of 50 cents for a delinquency certificate falls within the principal *de minimis non curat lex*. *Sound Investment Co. v. Bellingham Bay Land Co.*.. 470
34. APPEAL—DECISIONS—LAW OF CASE. A decision of the supreme court that a description of an engine in a conditional bill of sale was a sufficient memorandum to give constructive notice to subsequent purchasers and incumbrancers becomes the law of the case on a retrial; and it is error on the retrial to submit the question to the jury. *Wittler-Corbin Machinery Co. v. Martin*..... 65
35. APPEAL—DECISION—LAW OF CASE. A decision on appeal becomes the law of the case on a retrial. *Menasha Wooden Ware Co. v. Nelson* 160

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

36. APPEAL—DECISION—REMISSION TO AVOID ERROR. Upon appeal from a judgment for personal injuries for error in submitting an item of \$194 for hospital services and medical attendance, the judgment will be affirmed if such item is remitted by the respondent. *Olson v. Erickson* 458
37. APPEAL—DECISION—EFFECT—QUESTION DECIDED—JUDGMENT AFTER REMAND. Where the decision of the supreme court upholding a boom site location holds that the state has dominion, for the purpose of boom sites, over both land and water, and has conferred upon the boom company the right to operate a boom in certain waters, the decree upon remand properly designates the waters of the river to be appropriated, the decision of the supreme court being *res judicata*. *State ex rel. North Shore Boom & Driving Co. v. Nicomen Boom Co.* 499
38. SAME. Where a complaint asks for an injunction against interference with a boom site, and such relief is denied, a judgment on appeal, which holds that such interference is unwarranted and must be restricted and that the conclusions of the trial court were erroneous, and directs a reversal accordingly, requires the entry, upon remand, of judgment granting the injunctive relief prayed for. *State ex rel. North Shore Boom & Driving Co. v. Nicomen Boom Co.*.. 499
39. APPEAL—DECISION—JUDGMENT ON REMAND. A decree upon remand properly describes a boom site location where it follows a plat, findings, and complaint specifically referred to and upheld by the decision of the supreme court. *State ex rel. North Shore Boom & Driving Co. v. Nicomen Boom Co.*..... 499

APPEAL AND ERROR—CONTINUED.

40. **APPEAL—DECISION — PROCEEDINGS ON RETRIAL — TAXATION — FORECLOSURE.** Where, upon reversal of a tax foreclosure, the supreme court directs a determination of the proper portion of taxes to be borne by each of several lots assessed *in solido*, on a retrial, the value of each lot is to be determined by evidence and the tax apportioned among them, with statutory interest. *Sound Investment Co. v. Bellingham Bay Land Co.*..... 470
41. **APPEAL—DECISION—EFFECT—JUDGMENT—VACATION.** After a judgment has been affirmed on appeal, the superior court has no jurisdiction of an action to vacate it for fraud, the supreme court not having granted leave to attack it. *Kath v. Brown*..... 480

APPEARANCE:

1. **APPEARANCE—PROCESS—WAIVER OF DEFECTS IN SUMMONS.** An objection as to the sufficiency of the summons is waived by a general appearance or voluntarily pleading to the merits and going to trial without saving a special appearance. *Bellingham v. Linck*.... 208
2. **APPEARANCE—GENERAL—WAIVER OF SPECIAL APPEARANCE—APPEAL—DECISION—REMAND.** A general appearance in the supreme court, without reserving or alluding to a prior special appearance to object to the jurisdiction, waives the latter; and upon a reversal for a new trial, the lower court is vested with complete jurisdiction. *Columbia & Puget Sound R. Co. v. Moss*..... 512

APPLIANCES:

Liability of employer for defects, see **MASTER AND SERVANT**, 2, 3, 14, 21.

APPOINTMENT:

Of public officers in general, see **OFFICERS**.

ARREST OF JUDGMENT:

In criminal prosecutions, see **CRIMINAL LAW**, 4.

ASSESSMENT:

Limitation of proceeding for payment of expenses of ditch constructed under void act, see **EMINENT DOMAIN**, 8.
 Of expenses of public improvements, see **DRAINS; MUNICIPAL CORPORATIONS**, 5-10, 16-21.
 Of tax, see **TAXATION**, 3.

ASSIGNMENTS:

Of error on appeal, see **APPEAL AND ERROR**, 8.
 Of bill of lading, see **CARRIERS**, 2.

ASSIGNMENTS—CONTINUED.

1. **ASSIGNMENTS—RIGHT OF ASSIGNEE.** The assignee of a contract which expressly declares that it is not negotiable or assignable acquires only a cause of action against the assignor. *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*..... 302

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 14-19, 24-27.

ATTACHMENT:

Levy of and priority of chattel mortgage, see **CHATTEL MORTGAGES**, 4.

ATTORNEY AND CLIENT:

Fees on foreclosure of chattel mortgage, see **CHATTEL MORTGAGES**, 5.
 Laws disbaring attorney for barratry as denial of liberty to engage in lawful occupation, see **CONSTITUTIONAL LAW**, 2.

1. **ATTORNEY AND CLIENT—DISBARMENT—GROUNDS—BARRATRY — PERJURY.** The commission of the crimes of barratry or perjury is ground for the disbarment of an attorney. *State ex rel. Mackintosh v. Rossman* 1
2. **ATTORNEY AND CLIENT—DISBARMENT—JURY—RIGHT TO TRIAL.** A proceeding to disbar an attorney at law, under Bal. Code, §§ 4776, 4777, is in the nature of a civil action, in which a trial by jury is not required. *State ex rel. Mackintosh v. Rossman*..... 1
3. **ATTORNEY AND CLIENT—EMPLOYMENT—HUSBAND AND WIFE—COMMUNITY PROPERTY—AUTHORITY OF HUSBAND.** An attorney was authorized to represent a wife in the settlement of condemnation proceedings against community property, where it appears that both husband and wife were parties and served with process, that he was employed by the husband, as he presumed, to represent both, and the husband was authorized by the wife to employ counsel in the case and he understood the attorney was to represent her. *Pearl Oyster Co. v. Seattle & Montana R. Co.*..... 101

AUTHORITY:

Of attorney, see **ATTORNEY AND CLIENT**, 3.
 Of broker, see **BROKERS**, 1.
 Of corporate officers or agents, see **CORPORATIONS**, 6, 7.
 Of insurance agent, see **INSURANCE**, 1, 5.
 Of agent, see **PRINCIPAL AND AGENT**, 3.
 Of receiver to bind stockholders by compromise, see **RECEIVERS**.

BAILMENT:

Carriage of goods, see **CARRIERS**, 1, 2.
 By warehousemen, see **WAREHOUSEMEN**.

BANKS AND BANKING:

Forgery of checks, see **FORGERY**.

BAR:

Of action by former adjudication, see **DIVORCE**, 1, 2; **JUDGMENT**, 2, 6-9.

BARRATRY:

As ground for disbarment of attorney, see **ATTORNEY AND CLIENT**, 1; **CONSTITUTIONAL LAW**, 2.

BARRIERS:

Duty of county to guard dangerous highway, see **HIGHWAYS**.

BENEFICIAL ASSOCIATIONS:

Mutual benefit insurance association, see **INSURANCE**, 2, 8-10.

BENEFITS:

Assessment of benefits caused by construction of public improvements, see **MUNICIPAL CORPORATIONS**, 5-10, 16-21.

BILL OF LADING:

See **CARRIERS**, 1, 2.

BILL OF PARTICULARS:

In pleading in civil action, see **PLEADING**, 3.

BILL OF SALE:

Covenants of warranty on sale of personal property, see **COVENANTS**, 1.

Description in conditional bill of sale as constructive notice, see **SALES**, 6.

BILLS AND NOTES:

Note given by guest for room rent as settlement of claim against innkeeper for loss of property, see **COMPROMISE AND SETTLEMENT**.

Authority of officers to execute notes on behalf of corporation, see **CORPORATIONS**, 7.

Issuance of check without funds or credit in bank, see **FORGERY**.

Default in paying installments as maturity of whole debt, see **MORTGAGES**.

1. **BILLS AND NOTES—INDORSERS—PRESUMPTIONS.** The fact that renewal notes were not signed by indorsers of the original note raises a presumption that they signed only as sureties. *Spencer v. Alki Point Transportation Co.*..... 77
2. **BILLS AND NOTES—TRANSFER—BONA FIDE PURCHASERS.** The bona fides of the purchase of notes made by a corporation to its president is not affected by the relations between the president and the corporation. *Spencer v. Alki Point Transportation Co.*..... 77

BILLS AND NOTES—CONTINUED.

3. **BILLS AND NOTES—TRANSFER—BONA FIDE PURCHASERS—NOTICE OF INFIRMITY.** The fact that the first of four mortgage notes was overdue at the time of the assignment of the mortgage and notes, does not constitute notice of an infirmity in the three unmatured notes in the hands of innocent purchasers in good faith, especially where a payment of part of the principal and interest on the first note was indorsed as paid after its maturity; in view of Laws 1899, p. 350, § 56, defining notice of an infirmity in a negotiable instrument to be actual knowledge of the defect or of such facts as to amount to bad faith. *Spencer v. Alki Point Transportation Co.*..... 77
4. **BILLS AND NOTES—TRANSFER—BONA FIDE PURCHASERS.** A transferee of notes after dishonor and suit, as security for an antecedent debt, is not a bona fide purchaser. *Spencer v. Alki Point Transportation Co.*..... 77
5. **BILLS AND NOTES—DISHONORED DRAFT—DEFENSES—WANT OF CONSIDERATION—EVIDENCE—TO VARY WRITING.** It is a good defense to an action upon a dishonored draft, brought by the drawee against the drawer, that plaintiff had falsely represented to defendant that the proceeds of certain mining claims in which the parties had been interested and which now belonged to plaintiff had been deposited in bank to the credit of the defendant, and that defendant, relying thereon, and as an accommodation to plaintiff, had, without consideration, drawn the draft on the bank to enable plaintiff to draw down the funds; and evidence of such fact does not vary the written instrument, but is admissible to show want of consideration, within Laws 1899, p. 340, § 28, making the same a matter of defense. *Preas v. Vollintine*..... 137
6. **BILLS AND NOTES—CONSIDERATION.** The maker of a note may show want of consideration. *Spencer v. Alki Point Transportation Co.*..... 77
7. **BILLS AND NOTES—INDORSEMENT—PAROL EVIDENCE TO CONTRADICT—NATURE OF LIABILITY.** Parol evidence is admissible to show that the indorsers signed as sureties although the note recited that every party signing or indorsing the note bound himself as principal and not as surety. *Spencer v. Alki Point Transportation Co.*..... 77

BONA FIDE PURCHASER:

Of bill or promissory note, see **BILLS AND NOTES**, 2-4.
 Of lands, see **VENDOR AND PURCHASER**, 14.

BOUNDARIES:

Description of land in deeds, see **DEEDS**, 1, 2.

BREACH:

Of covenants, see **COVENANTS**, 2, 3.
 Accrual of action on bonds for breach of contract, see **INDEMNITY**.
 Of contract to convey land, see **VENDOR AND PURCHASER**.

BRIEFS:

On appeal or writ of error, see **APPEAL AND ERROR**, 12.

BROKERS:

Evidence to prove custom in paying commissions, see **CUSTOMS AND USAGES**, 2.

Contract for commissions as within statute of frauds, see **FRAUDS, STATUTE OF**, 4.

Insurance broker, see **INSURANCE**, 1.

1. **BROKERS—AUTHORITY—RATIFICATION.** A broker is the agent of the vendors where it appears that he approached them advising that he had a prospective purchaser, that they agreed to pay a commission in case of a sale, and that the broker signed a contract as "agent for the owner," which was approved in writing by the owners, thereby ratifying the agency. *Lawler v. Armstrong*.. 664
2. **BROKERS—RIGHT TO COMMISSIONS—CONSUMMATION OF SALE.** Under an agreement to pay a broker commissions on a cash sale, "in case sale is consummated, or one-third of earnest money in case same is forfeited," the broker is entitled to recover commissions, where, after a sale to a responsible party, who refused to consummate it, the vendors elected to sue for specific performance, recovered a collectible judgment for the price, and compromised the same on a slight reduction, without the consent of the broker; as the sale was thereby consummated. *Lawler v. Armstrong*..... 664
3. **BROKERS—EMPLOYMENT—COMPENSATION—TIME LIMIT—WAIVER—SALE EFFECTED.** Brokers authorized by a corporation to sell a mine within sixty days, are entitled to commissions, and the sixty-day limitation is waived, where the authorized agent of the corporation thereafter repeatedly urged them to continue their services, and they were not notified to cease their operations until a year later at a time when the corporation's agent had effected a sale to the brokers' customer at a less price, which sale was ratified by the corporation; as knowledge of the authorized agent was the knowledge of the corporation when it accepted the benefits of the sale. *Lawson v. Black Diamond Coal Mining Co.*..... 614
4. **BROKERS—COMMISSIONS—SEVERAL BROKERS—EFFICIENT CAUSE OF SALE.** Brokers are not entitled to commissions on a sale to a customer originally found by them, but who was unable to meet the terms, where, after negotiations had ceased and the matter was abandoned, another agent, with whom the property had also been listed, took up the matter independently and induced the customer to make the purchase, being enabled to do so by the help of friends who came to his assistance; since, of several brokers, the one whose effort was the efficient cause of the sale is entitled to recover the commissions. *Frink v. Gilbert*..... 392

BROKERS—CONTINUED.

5. **SAME—CONTRACT TO DIVIDE.** An undisclosed agreement by a broker to divide his commissions with the purchaser is no defense to an action against the vendors for the commissions, where they were not injured thereby. *Lawler v. Armstrong*..... 664
6. **SAME—AMOUNT OF COMMISSION.** Where brokers were authorized to effect a sale at a certain price at a commission of five per cent, and the owner, without terminating the employment, made a sale to the broker's customer at a less sum, the brokers are entitled to a commission of five per cent on the selling price. *Lawson v. Black Diamond Coal Mining Co.*..... 614
7. **SAME—DUTY OF BROKER—FAILURE TO DISCLOSE.** Failure of a broker to disclose that the purchaser was acting as agent for an undisclosed principal is not a defense to an action for commissions, where the ostensible purchaser was responsible and the vendors were not injured. *Lawler v. Armstrong*..... 664

BUILDINGS:

Bonds guaranteeing building contracts, see **INDEMNITY**.

BURDEN OF PROOF:

- Intent to defraud by issuance of check, see **FORGERY**, 3.
- To show good faith in transaction between husband and wife, see **FRAUDULENT CONVEYANCES**, 1.
- To show solvency on attacking fraudulent conveyance by levy of execution, see **FRAUDULENT CONVEYANCES**, 2.
- To show nonliability of innkeeper for loss of property of guest, see **INNKEEPERS**, 1.
- To show nonpayment of premium on insurance policy, see **INSURANCE**, 12.

CANCELLATION OF INSTRUMENTS:

- Cancellation of insurance policy, see **INSURANCE**, 5-7.
- Waste warranting cancellation of lease, see **LANDLORD AND TENANT**.
- Rescission of contract of sale of land, see **VENDOR AND PURCHASER**, 1, 2, 4-7, 15.

CARRIERS:

- Statute limiting hours of labor of employees of common carrier, see **STATUTES**, 2.
1. **CARRIERS—STATUTES—CONSTRUCTION.** Bal. Code, § 3601, providing that a bill of lading does not alter the rights or obligations of the carrier as defined in the negotiable instrument law, unless plainly inconsistent therewith, authorizes the parties to agree upon a bill of lading that is nonnegotiable; although Bal. Code, § 3598, declares that all bills of lading are negotiable. *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*..... 302

CARRIERS—CONTINUED.

2. CARRIERS—OF GOODS—BILL OF LADING—NEGOTIABILITY. Delivery by the consignor of a carrier's bill of lading passes no right to the property, where the bill acknowledged receipt of the property from the consignor, gave the name of the consignee and destination, and was stamped in large letters across its face, "not negotiable or assignable," and contained no stipulation reserving ownership in the consignor; as the same is in effect but a receipt for the lumber with a contract that it shall not be assigned. *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*..... 302
3. CARRIERS—LIVE STOCK—LIMITATION OF LIABILITY—SAFETY OF STOCK PENS—VALIDITY—CONSTRUCTION. A provision in a contract for the shipment of stock requiring the shipper to inspect cars and stock pens and to report any visible defects and demand repairs, on pain of accepting their sufficiency, does not relieve the company from liability for negligence in failing to furnish suitable stock pens, as it would be void if so construed; and it only requires the shipper to assume liability when the defect is known or plainly visible to a casual observer. *Buck v. Oregon R. & Navigation Co.*..... 113
4. SAME—INSPECTION BY SHIPPER—EVIDENCE—SUFFICIENCY. The shipper of stock does not assume the liability for loss of stock that escaped from a stock pen through a gate negligently fastened with a bent hook which yielded to pressure on the gate from the inside, and which had been in that condition for some time, where it appears that he was taken to inspect the pen at night, that it was the only one unoccupied, that he walked around it, and found it apparently sufficient and in good condition and the gate fastened. *Buck v. Oregon R. & Navigation Co.*..... 113
5. SAME—QUESTION FOR JURY. Where a stock pen was secure except that the gate was fastened with a bent hook that yielded to pressure on the gate from the inside, and in the morning the gate was found open, whether the escape of the stock was due to the defective hook is a question for the jury. *Buck v. Oregon R. & Navigation Co.* 113
6. SAME—INSTRUCTIONS—DUTY TO STOP FOR PASSENGERS. Instructions as to the duty of a motorman to keep a lookout for passengers are not erroneous in that they were not restricted to regular stopping places, where the evidence and circumstances of the case related only to a regular stopping place. *Harkins v. Seattle Electric Co.* 184
7. CARRIERS—NEGLIGENCE—TAKING UP PASSENGERS—PLATFORM AND LIGHTS. There is sufficient evidence of negligence on the part of a street railway company to make a case for the jury, where it appears that an intending passenger was struck by an approaching car while she was standing on the first or second step at the bottom of a stairway leading down to defendant's tracks, on a crossing used by the public, very near the end of defendant's platform intended for passengers, that passengers were in the habit of getting on and off the cars from the stairs, that the place was very poorly lighted

CARRIERS—CONTINUED.

and the night so dark that the plaintiff could not see that she would be struck by the car, and the car was going at considerable speed and her signal to stop was not heeded by the motorman. *Harkins v. Seattle Electric Co.*..... 184

8. **CARRIERS—INJURY TO PASSENGERS—STREET CARS—SUDDEN JERKS—PRESUMPTIONS—RES IPSA LOQUITUR—EVIDENCE—SUFFICIENCY.** There is no presumption of negligence in the starting of a cable car on a steep grade with a sudden jerk, whereby a passenger standing in front was thrown against a window which broke and injured a passenger inside, where jerks in starting were frequent and unavoidable; and there being no other evidence of negligence or any showing as to whether the standing passenger was negligent, a judgment is properly directed for defendant notwithstanding a verdict for the plaintiff. *De Yoe v. Seattle Electric Co.*..... 588
9. **SAME.** The doctrine of *res ipsa loquitur*, as applied to negligence cases, applies only where the accident, in the light of ordinary experience, is inexplicable except as the result of negligence. *De Yoe v. Seattle Electric Co.*..... 588
10. **SAME—CONTRIBUTORY NEGLIGENCE.** In such a case, the plaintiff was not guilty of contributory negligence as a matter of law. *Harkins v. Seattle Electric Co.*..... 184

CERTIFICATE:

Sheriff's certificate as color of title, see **ADVERSE POSSESSION**, 1.

CERTIORARI:

Review of condemnation proceedings, see **EMINENT DOMAIN**, 12.
Remedy by certiorari as bar to prohibition, see **PROHIBITION**.

CESSATION OF CONTROVERSY:

As affecting right to appeal, see **APPEAL AND ERROR**, 3.

CHARGE:

To jury in civil actions, see **TRIAL**, 3-5.

CHARTER:

Municipal charters, see **MUNICIPAL CORPORATIONS**, 1-3, 17, 18.
Duty conferred on railroad by charter in operation of trains, see **RAILROADS**, 5, 6.

CHATTEL MORTGAGES:

1. **CHATTEL MORTGAGES—RECORD—FILING—NECESSITY.** Under Laws 1899, p. 157, § 6, it is not necessary to record a chattel mortgage where the debt secured is less than \$300, and filing in the auditor's office within ten days after execution is sufficient, under *Id.*, § 2. *Fenby v. Hunt*..... 127

CHATTEL MORTGAGES—CONTINUED.

2. **SAME—FILING—TIME—EXECUTION.** A chattel mortgage "dated" December 9th, but not delivered until December 13th, is not "executed" until the latter date, and is filed within ten days from "execution" if filed December 21st. *Fenby v. Hunt*..... 127
3. **CHATTEL MORTGAGES—DESCRIPTION OF PROPERTY—RIGHTS OF CREDITORS—ACTUAL NOTICE.** A prior creditor who has actual notice of a chattel mortgage given by the judgment debtor to a third person, cannot set up insufficiency of the description in the chattel mortgage, and claim priority on attaching the property. *Fenby v. Hunt* 127
4. **SAME—PRIORITY—ATTACHMENT.** A chattel mortgage filed within ten days of execution, takes priority over an attachment levied after execution of the mortgage. *Fenby v. Hunt*..... 127
5. **CHATTEL MORTGAGES—FORECLOSURE—ATTORNEY'S FEES—AMOUNT.** Where a note and chattel mortgage provided for the payment of "_____ dollars attorney's fees," it is not error to allow an attorney's fee in a sum admitted by opposite counsel at the trial to be a reasonable attorney's fee. *Fenby v. Hunt*..... 127

CHECKS:

Issuance of check without funds or credit in bank, see **FORGERY**.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CIVIL RIGHTS:

Constitutional guaranty of civil rights, see **CONSTITUTIONAL LAW**, 2.

CLAIMS:

Against municipal corporation for injury in streets, notice of, see **MUNICIPAL CORPORATIONS**, 22-24.

COLLATERAL ATTACK:

On default judgment, see **JUDGMENT**, 5.

COLLATERAL UNDERTAKINGS:

See **FRAUDS**, **STATUTE OF**, 1.

COLOR OF TITLE:

Necessity to sustain adverse possession, see **ADVERSE POSSESSION**.

COMITY:

Validity of foreign divorce, see **DIVORCE**, 7.

COMMENT:

Review of comment on evidence as dependent on exception in lower court, see **APPEAL AND ERROR**, 7.

On evidence by judge, see **TRIAL**, 3.

COMMERCE:

Carriage of goods and passengers, see **CARRIERS**.

Statute limiting hours of labor of employees of common carrier, see **STATUTES**, 2.

COMMISSIONS:

Of broker, see **BROKERS**, 2, 6.

Refund by agents on cancellation of policy, see **INSURANCE**, 5.

COMMON CARRIERS:

See **CARRIERS**.

COMPENSATION:

Of broker, see **BROKERS**, 2, 6.

Pecuniary compensation for injuries caused by unlawful acts of another, see **DAMAGES**.

For property taken for public use, see **EMINENT DOMAIN**, 4-6, 13.

COMPETENCY:

Of fellow employees, see **MASTER AND SERVANT**, 20.

COMPROMISE AND SETTLEMENT:

Compromise by receiver as binding stockholders, see **RECEIVERS**.

1. **COMPROMISE AND SETTLEMENT—INNKEEPER'S LIABILITY—LOSS BY GUEST.** Where guests suffered a loss of personal property left in their room, a note given in payment for a balance due upon room rent in order to release their baggage, is not a settlement of the claim for the loss of property. *Watt v. Kilbury*..... 446

CONCLUSIVENESS:

Determination and conclusiveness of question of public use and necessity, see **EMINENT DOMAIN**, 3.

Of judgment, see **JUDGMENT**, 2, 6-9.

CONDEMNATION:

Taking property for public use, see **EMINENT DOMAIN**.

CONDITIONAL SALES:

See **SALES**, 6.

CONDITIONS:

Precedent to action by minority stockholders against corporation, see **CORPORATIONS**, 3.

Precedent to action to annul tax judgment, see **TAXATION**, 10, 11.

Precedent to rescission of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 6.

CONSIDERATION:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 5, 6.
 Oral promise as consideration for trust, see **TRUSTS**, 2, 3.

CONSTITUTIONAL LAW:

Establishment and organization of courts, see **COURTS**.
 Delegation of municipal power, see **MUNICIPAL CORPORATIONS**, 1-3.
 Election of officers, see **OFFICERS**.
 Restraining exercise of judicial functions, see **PROHIBITION**.

1. **CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—FORGERY.** Laws 1905, p. 78, making it a felony to issue a check on a bank without funds or credit to meet it, with intent to defraud, is not unconstitutional as authorizing imprisonment for debt. *State v. Pilling* 464
2. **CONSTITUTIONAL LAW—CIVIL RIGHTS—ATTORNEYS—DISBARMENT—BARRATRY.** Laws 1903, p. 68, making the personal solicitation of employment by an attorney barratry and ground for disbarment, is a reasonable restriction upon the right to practice law, which is a privilege and not a natural right; and is not, therefore, in derogation of the 14th amendment guaranteeing the liberty of the citizen to engage in lawful occupations. *State ex rel. Mackintosh v. Rossman* 1

CONSTRUCTION:

Of contract, see **CONTRACTS**.
 Of covenants of warranty in bill of sale, see **COVENANTS**, 1.
 Of provisions in fire insurance policy, see **INSURANCE**, 3, 8.
 Of contract to determine right of "purchasers" to prize offered by vendor of townsite lot, see **LOTTERIES**.
 Statute giving lien for material furnished in construction of railroad, see **RAILROADS**, 3.
 Of statute permitting minor to redeem land sold for taxes, see **TAXATION**, 8, 9.
 Of contract for storage, see **WAREHOUSEMEN**, 1.

CONSTRUCTIVE TRUSTS:

See **TRUSTS**, 3, 4.

CONTEMPT:

Appealability of order adjudging contempt and payment of costs, see **APPEAL AND ERROR**, 2.
 Disobedience of order for alimony, see **DIVORCE**, 5.

CONTINUANCE:

Of hearing on assessment for sewers, see **MUNICIPAL CORPORATIONS**, 7.

CONTRACTORS:

Bonds guaranteeing performance of building contract, see **INDEMNITY**.

CONTRACTS:

Assignment, see ASSIGNMENTS.

Bills and notes, see BILLS AND NOTES.

Compensation of broker, see BROKERS, 2, 6.

Transportation of goods, see CARRIERS, 2.

Limiting liability of carrier for negligence, see CARRIERS, 3-5.

Compromise, see COMPROMISE AND SETTLEMENT.

Personal liability of agent on stock subscription contract, see CORPORATIONS, 6.

Covenants of warranty, see COVENANTS.

Operation and effect of customs or usages, see CUSTOMS AND USAGES.

Parol evidence to vary, see EVIDENCE, 1-5.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Of indemnity, see INDEMNITY.

Of infants, see INFANTS.

Insurance contracts, see INSURANCE.

Offer of prize to purchasers of lot, see LOTTERIES.

Of marriage, see MARRIAGE.

Appointment of agent, see PRINCIPAL AND AGENT.

Sales of personalty, see SALES.

Agreements to purchase land as creation of trust relation, see TRUSTS.

Sale of land, see VENDOR AND PURCHASER.

Rescission of sale of land, see VENDOR AND PURCHASER, 1, 2, 4-7, 15.

Contracts for storage, see WAREHOUSEMEN, 1.

1. CONTRACTS—CONSTRUCTION—LAWS AFFECTING CONTRACT. A contract requiring leased premises to be completely equipped for a restaurant kitchen is presumed to be made in contemplation of Laws 1905, p. 77, prescribing certain sanitary arrangements for such premises. *Manvell v. Weaver*..... 408

CONTRIBUTORY NEGLIGENCE:

Of passenger struck by car, see CARRIERS, 10.

Of servant, see MASTER AND SERVANT, 16-19, 24-27.

CONVEYANCES:

Of personalty as security for debt, see CHATTEL MORTGAGES.

In general, see DEEDS.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

Separate property of married women, see HUSBAND AND WIFE, 1.

As security for debt, see MORTGAGES.

CONVICTS:

Materiality of name of on cross-examination, see WITNESSES.

CORPORATIONS:

- Bona fide purchaser of notes of corporation, see **BILLS AND NOTES**, 2-4.
- Priority of right to condemn lands, see **EMINENT DOMAIN**, 9.
- Municipalities, see **MUNICIPAL CORPORATIONS**.
- Compromise by receiver as binding stockholders, see **RECEIVERS**.
- Sale of corporate stock and action for price, see **SALES**, 3.
- Taxation of Federal franchise granted to, see **TAXATION**, 1-3.
1. **CORPORATIONS—STOCKHOLDERS—MEETINGS — NOTICE.** The undisclosed owner of corporate stock is not entitled to notice of a stockholders' meeting, where the stock stood in the name of his brother who managed it and was notified and appeared by proxy and voted at the meeting. *Wright v. Tacoma Gas & Electric Light Co.*... 262
 2. **CORPORATIONS—SUITS BY STOCKHOLDERS—EQUITY—LACHES.** Minority owners of corporate stock are guilty of laches precluding them from maintaining an action to set aside a sale of all the corporate assets to another company, where it appears that they delayed six months before beginning suit, during which time they were waiting to see whether they could make a favorable sale of bonds of the old company held by them, and that during such time the new company had issued and sold thousands of bonds and expended a great amount of money in alterations and completing large operations. *Wright v. Tacoma Gas & Electric Light Co.*..... 262
 3. **CORPORATIONS—STOCKHOLDERS—MINORITY—EXHAUSTING REMEDIES IN CORPORATION.** A complaint, by minority stockholders, of an alleged "freeze out" is demurrable where it fails to show that they have exhausted their remedies in the corporation, or any excuse for failure so to do. *Seattle & Northern R. Co. v. Bowman*..... 416
 4. **CORPORATIONS—POWERS—SURETYSHIP.** In the absence of evidence of power in the charter so to do, a corporation cannot become a surety upon a note. *Spencer v. Alki Point Transportation Co.*... 77
 5. **SAME—DEFENSES—ULTRA VIRES.** A corporation is not estopped to set up the defense of *ultra vires* to an action upon a surety obligation, where the evidence that it received the benefit of the contract is vague and uncertain. *Spencer v. Alki Point Transportation Co.* 77
 6. **CORPORATIONS—OFFICERS—PERSONAL LIABILITY—CONTRACTS—PRINCIPAL AND AGENT.** A treasurer of a corporation is personally liable upon a contract wherein he agreed with the subscriber to the capital stock of the corporation, that "I will, upon demand, accept a return of his stock, and refund to him the money he has paid," on certain conditions, although to his signature he affixed "Treas.," since that was *descriptio personae* only, and an agent may become personally bound by the form of his promise. *Gavazza v. Plummer*..... 14

CORPORATIONS—CONTINUED.

7. CORPORATIONS—CONTRACTS—EXECUTION OF NOTE—OFFICERS—GENERAL POWERS. There is sufficient *prima facie* evidence of the execution of a note by a corporation, where it is shown that the note was given for obligations of the corporation, and was executed by an officer to whom the trustees had intrusted the sole management of its financial affairs. *State Bank of Washington v. Spokane-Columbia River R. and Navigation Co.*..... 528
8. CORPORATIONS—RECEIVERS—INSOLVENCY—EVIDENCE. In an application for the appointment of a receiver, a corporation is conclusively shown to be solvent where it appears that its mines had cost \$40,000 and were worth \$50,000 and were producing seven tons of ore per day at a net profit of \$4 per ton, and the total indebtedness of the company was about \$4,000. *Secord v. Wheeler Gold Mining Co.* 620
9. SAME—RECEIVERS—MISMANAGEMENT—NECESSITY—EVIDENCE—SUFFICIENCY. Mismanagement of a corporation, entitling stockholders to the appointment of a receiver, is not shown by the fact that a director was allowed a salary as manager (the by-laws only prohibiting the payment of compensation to directors as such), that his traveling expenses were allowed, that for convenience the books were removed to another state where all the property was located, that a small *bona fide* debt to the wife of the president was not shown in all the semi-annual statements (it appearing on the books), or that stockholders inquiring at the main office were not furnished all the information desired; since absolute necessity must be shown by clear evidence, and mere carelessness, mistakes or bad policy honestly pursued is not sufficient. *Secord v. Wheeler Gold Mining Co.* 620
10. CORPORATIONS—PROCESS—ACTIONS—VENUE—FOREIGN CORPORATION. Laws 1901, p. 356, § 6, requiring beneficial associations to appoint the state insurance commissioner, at Olympia, their statutory agent upon whom service of process may be made, does not require that actions against them be commenced in Thurston county, when such an association has no office or agent in the state for conducting its general business; Bal. Code, § 4854, requiring actions against a corporation to be commenced in the county where it has an office or any person resides upon whom process may be served, not applying in such a case. *Campbell v. Order of Washington*..... 398
11. CORPORATIONS—FOREIGN—SERVICE OF PROCESS—DOING BUSINESS IN THIS STATE. The routing, by a soliciting agent, of freight and passenger business over the line of a foreign railway does not make him an agent of the company upon whom service of process may be made; and when contracts are made therefor as the contracts of other companies, which arranged the division of the transportation, the transaction does not amount to "doing business in this state" by the foreign connecting lines. *Arrow Lumber and Shingle Co. v. Union Pac. R. Co.*..... 629

CORROBORATION:

Of accomplices in criminal prosecutions, see **CRIMINAL LAW**, 2.
Of prosecutrix in prosecution for rape, see **RAPE**.

COSERVANT:

See **MASTER AND SERVANT**, 7-9, 11, 12, 15.

COSTS:

Appealability of order adjudging contempt and payment of costs, see **APPEAL AND ERROR**, 2.
Assessment of trivial amount as harmless error, see **APPEAL AND ERROR**, 33.
Inclusion of costs on reassessment for local improvement, see **MUNICIPAL CORPORATIONS**, 9.
Liability of sheriff as party in interest in action to restrain execution sale, see **PARTIES**.
Entry of personal judgment for in action to foreclose tax lien, see **TAXATION**, 6.

1. **COSTS—ON APPEAL—DECISION—EXCESSIVE JUDGMENT—OBJECTIONS BELOW.** Upon appeal from an excessive judgment for a loss by fire, being for the full value rather than three-fourths of the value of the property insured, in which the judge was in doubt as to the evidence of value and requested a transcript of the evidence, the appellant will not be allowed costs on reversal of the judgment because excessive in amount, where the excess was not called to the attention of the trial court below. *Olympia Brewing Co. v. Pioneer Mutual Insurance Association*..... 16

COTENANTS:

Right to injunction, see **INJUNCTION**, 1.

COUNTIES:

Assessments for benefits to property from drains, see **DRAINS**.
Maintenance of highways and duty to guard against dangers, see **HIGHWAYS**.

COUNTY TREASURER:

Vacancies and term of office, see **OFFICERS**.

COURTS:

Review of decisions, see **APPEAL AND ERROR**, 1, 2.
Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 34, 35, 37.
Jurisdiction and proceedings in suits for divorce, see **DIVORCE**.
Conclusiveness of judgments, see **JUDGMENT**, 2, 6-9.
Prohibiting judicial proceedings, see **PROHIBITION**.

COURTS—CONTINUED.

1. COURTS — APPELLATE COURTS — ORGANIZATION — SEPARATE DEPARTMENTS—QUORUM. Under Const., art. 4, § 2, providing for five judges of the supreme court "a majority of whom shall be necessary to form a quorum," and which further provides that the legislature may increase the number of judges, "and may provide for separate departments," it was competent for the legislature, by Laws 1909, pp. 33-37, to increase the number to nine judges, and provide for two departments of the court, consisting of five judges each, three of whom shall constitute a quorum for the transaction of business in a department; and a litigant is not entitled, as a matter of right, to a rehearing by the full court sitting *en banc*, authorized by section 4 of the act. *State ex rel. Vanderveer v. Gormley*..... 543

COVENANTS:

Mutuality of covenants in land contract, see VENDOR AND PURCHASER, 1.

1. COVENANTS—WARRANTY—SALES—PROPERTY CONVEYED—RULES OF CONSTRUCTION. A bill of sale of "all our interest" in certain personal property, specifying that the sale is subject to certain described liens which the vendee assumed to pay, and concluding with a general covenant "to warrant and defend the sale of said property," warrants the vendor's title to the property and is not a mere quit-claim of the vendor's interests; since, while covenants affect only the interest conveyed, such interest is to be determined by the intent of the parties, construing all the terms of the contract together, and most strongly against the vendor. *Bevan v. Muir*..... 54
2. COVENANTS—ACTION FOR BREACH—DEFENSES. In an action on a covenant of general warranty of public lands, applied for by the grantor, but for which patent had not issued, it would be a good defense to the action if the grantee, knowing the conditions, upon consideration, agreed to perfect and complete the title, and the title failed through his neglect and default. *Menasha Wooden Ware Co. v. Nelson*..... 160
3. COVENANTS—WARRANTY—BREACH — DAMAGES RECOVERABLE — PAYMENTS ON ASSUMED DEBT—SALES—INTERESTS WARRANTED. Upon breach of a warranty of vendor's interest in property which he had held under a conditional sale, sold subject to the original owner's lien for unpaid purchase money, which the vendee assumed and agreed to pay, the vendee cannot recover a sum paid in partial discharge of such lien, on the theory that it was part of the purchase price. *Bevan v. Muir*..... 54

CRIMINAL LAW:

See FORGERY; LARCENY; RAPE.

Constitutional guaranties of personal liberty and security, see CONSTITUTIONAL LAW, 1.

CRIMINAL LAW—CONTINUED.

Restraining prosecution of criminal charge, see PROHIBITION.

Trial of civil actions, see TRIAL.

Cross-examination of witnesses, see WITNESSES.

1. CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL—DISCRETION. Under Bal. Code, § 6902, providing that the court may permit a plea of guilty to be withdrawn, the court should liberally exercise its discretion in favor of life and liberty, but a refusal can only be reviewed for abuse of discretion, and it is not an abuse of discretion to refuse leave to withdraw a plea, asked on the ground that immunity had been promised accused by a detective, where that fact is controverted and it appears that the accused was informed of his rights, knew the effect of his plea, and the prosecuting witness had disappeared and his whereabouts were unknown. *State v. Cimini* 268
2. CRIMINAL LAW—TESTIMONY OF ACCOMPLICES—INSTRUCTIONS. It is not error in giving a correct instruction cautioning the jury against convicting upon the uncorroborated testimony of an accomplice, to refuse to instruct that in most cases the same is clearly insufficient and that the jury cannot convict thereon if the accomplice has testified differently at some other time. *State v. Jones*..... 142
3. CRIMINAL LAW—TRIAL—INTERPRETERS. It is not error, on receiving a plea of guilty, to appoint a city police detective as an interpreter; especially where the accused speaks broken English, and it appears from his conversation with the judge that he knew what the charge was and the effect of his plea. *State v. Cimini*..... 268
4. CRIMINAL LAW—TRIAL—ARREST OF JUDGMENT. A motion in arrest of judgment can only be based on the grounds specified in Bal. Code, § 6967. *State v. Cimini*..... 268
5. CRIMINAL LAW—JUDGMENT—RECITALS—APPEAL. Recitals in an order refusing to withdraw a plea of guilty import absolute verity on appeal as to matters that transpired before the judge. *State v. Cimini* 268
6. CRIMINAL LAW—APPEAL—REVIEW—MATTERS NOT BEFORE LOWER COURT. Upon appeal from an order refusing leave to withdraw a plea of guilty, entered in the court below when the prosecuting witness had disappeared, the supreme court cannot consider affidavits showing that the prosecuting witness had returned. *State v. Cimini* 268
7. CRIMINAL LAW—APPEAL—HARMLESS ERROR. Upon an application to withdraw a plea of guilty, it is not prejudicial error to receive affidavits as to the guilt of the accused, as they are immaterial. *State v. Cimini*..... 268

CROSS-APPEALS:

Necessity for to review errors, see APPEAL AND ERROR, 19.

CROSS-EXAMINATION:

See WITNESSES, 2, 3.

CROSSINGS:

Construction of railroads across other railroads, see RAILROADS, 2.

CUSTODY:

Support and custody of children, see DIVORCE, 4, 6.

CUSTOMS AND USAGES:

Proof of custom as to price and specifications on sale of lumber, see SALES, 1, 2.

1. CUSTOM AND USAGES—PLEADING—NECESSITY. A general custom need not be pleaded in order to admit evidence thereof in an action upon an obscure contract dependent upon such custom. *Ryder-Gougar Co. v. Garretson*..... 71
2. CUSTOM AND USAGE—EVIDENCE—TO PROVE CONTRACT—ADMISSIBILITY. Where a broker's commission was agreed upon, but there was a dispute as to whether the contract provided for payment of the commission on sales made by others in the agent's territory, evidence of the general custom as to commissions usually paid is inadmissible. *Peyser v. Western Dry Goods Co*..... 633

DAMAGES:

For breach of covenant, see COVENANTS, 3.

Condemnation of property taken for public use, see EMINENT DOMAIN, 4-6, 13.

As ground for injunction, see INJUNCTION, 1.

Evidence of in action for personal injuries through defect in street, see MUNICIPAL CORPORATIONS, 15.

Claims against city for personal injuries, see MUNICIPAL CORPORATIONS, 22-24.

Breach of warranty of goods sold, see SALES, 4, 5.

Breach by vendor of contract for sale of land, see VENDOR AND PURCHASER, 8, 15-17, 19, 20.

Measure of for negligence of bailee in storage of beef, see WAREHOUSEMEN, 3.

For obstruction of natural water course, see WATERS AND WATER COURSES.

1. DAMAGES—EVIDENCE—HOSPITAL AND MEDICAL SERVICES—INSTRUCTIONS. In an action for personal injuries it is error to give instructions allowing recovery for hospital services and medical attendance merely upon evidence that plaintiff had been in a hospital and been attended by a physician. *Olson v. Erickson*..... 453

DANGEROUS MACHINERY AND APPLIANCES:

See MASTER AND SERVANT.

DEATH:

1. **DEATH—PRESUMPTION FROM ABSENCE—TIME OF DEATH—INSURANCE—EVIDENCE—QUESTION FOR JURY.** The sudden unexplained disappearance and absence of a man for seven years raises a presumption of death, the time thereof being a question for the jury; and in an action for insurance, where it appears that the man was under middle age, with a wife and two small children, and was strongly attached to his family, respected in the community, and in good circumstances, the jury would be justified in finding that death was the cause of his disappearance. *Butler v. Supreme Court of The Independent Order of Foresters*..... 118

DEBT:

Imprisonment for debt, see **CONSTITUTIONAL LAW**, 1.
 Validity of oral promise to another for debt of another, see **FRAUDS, STATUTE OF**, 1.

DECISION:

On appeal, see **APPEAL AND ERROR**, 34-41.

DEEDS:

Presumptions as to record title to sustain subsequent deed from common grantor, see **EJECTMENT**, 1.
 In fraud of creditors, see **FRAUDULENT CONVEYANCES**.
 Separate property of married women, see **HUSBAND AND WIFE**, 1.
 Deeds of infants, see **INFANTS**.
 As notice to purchaser, see **VENDOR AND PURCHASER**, 14.

1. **DEEDS—DESCRIPTION—SUFFICIENCY—LATENT DEFECTS—EXTRINSIC EVIDENCE.** Where an addition contained twelve blocks numbered from 1 to 12 consecutively, each consisting of sixteen lots numbered from 1 to 16 consecutively, a deed of lots 7 and 8 in said addition is not void for uncertainty, as between grantor and grantee, where the grantors owned no lots 7 and 8 in said addition except in block 5, since the defect is latent and is explainable by extrinsic evidence. *Wetzler v. Nichols*..... 285
2. **DEEDS—DESCRIPTION—INTENT—MISTAKE—VENDOR AND PURCHASER—BOUNDARIES—MARKED ON GROUND.** A deed of the southwest quarter of a section is shown by the contemporaneous acts of the parties to have been executed by mistake as to the description of the tract intended to be conveyed, where it appears that the government quarter corner on the west side of the section was originally located by mistake nearly twenty chains north of its proper location, that when the deal was made this fact was unknown to the purchaser, who refused to consummate the deal until all the corners were located by a survey, whereupon a deputy county surveyor, with the parties attending, located all the corners except the unknown quarter corner, which could not be found, and which he re-established

DEEDS—CONTINUED.

half-way between the north and south lines of the section, and that the deal was thereupon consummated by the deed in question, and a fence was built on the line established by the survey, and possession taken and maintained by the parties for years in accordance with such survey and in ignorance of the true location of the quarter corner. *Town v. Greer*..... 350

3. **DEEDS—DELIVERY—PRIORITIES.** Leaving a deed for the grantees with the notary who took the acknowledgment is a sufficient delivery to give the same priority over a judgment subsequently filed. *Bender v. Ragan*..... 521

DEFAULT:

Cancellation of policy for nonpayment of loan, see **INSURANCE**, 6, 7.
In payment of note as maturity of whole debt, see **MORTGAGES**.

DEFENSES:

To action on draft or note, see **BILLS AND NOTES**, 5, 6.
To action by broker for commissions, see **BROKERS**, 5, 7.
By corporation to action on surety obligation, see **CORPORATIONS**, 5.
In action for breach of covenant of warranty, see **COVENANTS**, 2.
To contempt proceedings for failure to pay alimony, see **DIVORCE**, 5.
In action to compel assessment for drainage district, see **DRAINS**, 2.
In action on insurance policy, see **INSURANCE**, 10, 11.
In action for price, see **SALES**, 3.
In action to foreclose tax lien, see **TAXATION**, 5, 7.
Usury as defense, see **USURY**.

DELAY:

Laches, see **EQUITY**.
Laches in bringing action to vacate judgment, see **JUDGMENT**, 5.

DELEGATION:

Of power of cities to control sale of intoxicating liquors, see **INTOXICATING LIQUORS**.
Of master's duty to servant, see **MASTER AND SERVANT**, 7.

DELIVERY:

Of deed, see **DEEDS**, 3.

DEMAND:

By vendor for payment as condition precedent to declare forfeiture of contract, see **VENDOR AND PURCHASER**, 1.

DEPARTMENT:

Separate departments of supreme court, see **COURTS**.

DEPOSITS:

Deposit of deed as sufficient delivery, see **DEEDS**, 3.

DEPOSITIONS:

Effect of depositions in jury room, see TRIAL, 6.

DESCRIPTION:

Of goods mortgaged, see CHATTEL MORTGAGES, 3.

In petition of water rights sought to be condemned, see EMINENT DOMAIN, 11.

Of stolen property, see LARCENY, 1.

Of injury or defect causing same in claim against city, see MUNICIPAL CORPORATIONS, 23, 24.

Of property in conditional bill of sale, see SALES, 6.

DISBARMENT:

Of attorney, see ATTORNEY AND CLIENT, 1, 2.

Of attorney as violation of constitutional guarantee to engage in lawful occupation, see CONSTITUTIONAL LAW, 2.

DISCONTINUANCE:

Of action, see DISMISSAL AND NONSUIT.

DISCRETION OF COURT:

Review in civil actions, see APPEAL AND ERROR, 24.

In allowing plea of guilty to be withdrawn, see CRIMINAL LAW, 1.

Denial of motion to make bill of particulars more specific, see PLEADING, 3.

Order of proof in civil action, see TRIAL, 1.

Reopening case for further evidence, see TRIAL, 2.

Cross-examination of witness, see WITNESSES.

DISMISSAL AND NONSUIT:

Dismissal on appeal or writ of error, see APPEAL AND ERROR, 3, 12.

Review and waiver of errors on appeal, see APPEAL AND ERROR, 15, 17, 19.

Dismissal on merits as bar to another action, see DIVORCE, 1, 2.

Judgment of dismissal as *res adjudicata*, see JUDGMENT, 6, 7.

1. DISMISSAL AND NONSUIT—VOLUNTARY RIGHT TO. Under Bal. Code, § 5085, the plaintiff has an absolute right to a voluntary nonsuit, even though the action is tried before the court without a jury, at any time before submission of the case; and the case is not submitted where the plaintiff asked the nonsuit before resting because of the absence of necessary witnesses. *McPherson v. Seattle Electric Co.* 358

DITCHES:

See DRAINS.

DIVORCE:

Appealability of order directing execution of deed pursuant to decree distributing property, see **APPEAL AND ERROR**, 1.

Effect of failure to record judgment of divorce, see **JUDGMENT**, 1.

1. **DIVORCE—JUDGMENT—RES JUDICATA.** A judgment dismissing an action for divorce, based on the ground of cruelty, is *res judicata* and a bar to another action based upon acts of cruelty that occurred prior to the time of the trial. *Stay v. Stay*..... 534
2. **SAME.** Where a wife left her home and at once brought action for divorce on the ground of cruelty, dismissal of the action on the merits and a finding that the defendant was not at fault, is *res judicata* and a bar to an action for a divorce on the grounds of constructive abandonment by reason of cruelty and of failure to support since the former action, in the absence of any showing that the wife attempted to return and receive support at home. *Stay v. Stay*. 534
3. **DIVORCE—DECREE—DIVISION OF PROPERTY.** In granting a divorce and making a division of real estate, it is immaterial whether the only property of the parties was separate estate of the husband. *Leaser v. Leaser*..... 135
4. **SAME.** In granting a divorce to a wife on the ground of cruelty, leaving her with five minor children to support (four by a former marriage) it is an abuse of discretion to award her but \$350 out of property of the value of \$1,600, and ten dollars per month for the support of an infant child, where her husband was an able-bodied man earning from \$3.50 to \$5 per day eleven months in the year; and the decree will be modified on appeal so as to award her the whole of the property. *Leaser v. Leaser*..... 135
5. **DIVORCE—ALIMONY—INABILITY TO PAY—CONTEMPT—DEFENSES—EVIDENCE—SUFFICIENCY.** Pecuniary inability is a complete defense to contempt proceedings for failure to pay alimony; and the same is established by clear and satisfactory proof, where it appears that the defendant was a dentist, with no property except office furniture and instruments used in his practice, which were subject to a mortgage indebtedness of \$1,200 or \$1,500, that his income from the date of the decree fell short of his living expenses, and he was hopelessly insolvent. *Holcomb v. Holcomb*..... 611
6. **DIVORCE—DECREE—PROVISION FOR CHILDREN—REMARRIAGE—PARENT AND CHILD.** Where a decree of divorce set aside certain property for the benefit of children upon the prayer of the complaint asking that it be deeded in trust for them, the court lost jurisdiction to compel such conveyance where the parties remarried before conveyance and jointly petitioned for modification of the decree; the court having no jurisdiction to take control of the children in such case. *Lowe v. Lowe*..... 50

DIVORCE—CONTINUED.

7. **DIVORCE—FOREIGN DIVORCE—VALIDITY—DOMICILE—COMITY.** The courts of this state will, on the principal of comity, recognize the validity of a divorce granted by the courts of a sister state, to a husband who was for three years a resident in such state, although it is based on a substituted service and the matrimonial domicile was in another state; the divorce having been granted forty years ago and the wife having had notice thereof. *Douglas v. Teller*. 695
8. **DIVORCE—VALIDITY—FRAUD—SUBSTITUTED SERVICE—NAME OF DEFENDANT.** A foreign judgment of divorce obtained on substituted service against Elizabeth D. is not void as a fraud upon the defendant, whose true name was Hannah Elizabeth D., where there was evidence that he was commonly known by the former name. *Douglas v. Teller* 695

DRAINS:

Condemnation of property for drainage purposes, see **EMINENT DOMAIN**, 2, 7, 8.

1. **DRAINS—ASSESSMENTS—MANDAMUS TO COMPEL—LIMITATION OF ACTIONS.** The right of a county to make an assessment on property benefited by a drain being barred by the lapse of ten years, a proceeding by holders of void warrants to compel the county by mandamus to make a reassessment is barred by the lapse of the same time. *State ex rel. Seymour v. Slater*..... 608
2. **SAME—REFUSAL.** In such a case, the fact that the commissioners, upon request made, had not refused to proceed, would not affect the running of the statute, as the property owners could successfully make the defense. *State ex rel. Seymour v. Slater*..... 608

DUPLICATES:

Liability of purchaser for mistake and negligence in furnishing duplicate order for lumber, see **SALES**, 7, 8.

EJECTMENT:

Vacation of default judgment, see **ADVERSE POSSESSION**, 2.

Estoppel to maintain after waiver of right to compensation before taking land, see **EMINENT DOMAIN**, 5.

1. **EJECTMENT—RECORD TITLE—PRESUMPTIONS.** The plaintiff in ejectment cannot recover on the strength of a deed from a common grantor, whose prior deed of the same property to one P. was already on record when plaintiff's deed was made, P. having subsequently conveyed the record title to the defendants; and it is not incumbent on the defendants to explain their record title, or allowable for the court to indulge in presumptions to overthrow it. *Seymour v. Dufur* 646
2. **SAME—TITLE.** The plaintiff in ejectment must recover, if at all, on the strength of his own title. *Seymour v. Dufur*..... 646

ELECTION:

To treat mortgage debt as due on default, see **MORTGAGES**.

ELECTION OF REMEDIES:

On breach of implied warranty, see **SALES**, 4.

1. **ELECTION OF REMEDIES—ACTS CONSTITUTING—SUBSEQUENT SUITS—IRREVOCABILITY.** An election of remedies, once made, is irrevocable; and where a plaintiff has by his first action elected the remedy of damages, and upon dismissal, commenced a second suit attempting to elect another remedy, and upon dismissal thereof commenced a third suit for damages, the defendant cannot in the last suit set up the second action as an election of an inconsistent remedy; since the election of damages was irrevocably made in the first instance, and the doctrine has no application where the remedy shown is not available. *Babcock, Cornish & Co. v. Urquhart*..... 168
2. **SAME—OPTION AS TO ELECTION—WAIVER.** After an election of remedies is once made, it is fixed, and does not depend upon the subsequent choice of the parties, except as it is optional to waive or plead it. *Babcock, Cornish & Co. v. Urquhart*..... 168
3. **SAME—PLEADING—GENERAL DENIAL IN REPLY—EVIDENCE ADMISSIBLE.** Where an election of the remedy of damages was made by plaintiff's first action, which was dismissed, and plaintiff attempted to elect another remedy in a second action which was also dismissed, in a third action for damages, in which the defendant affirmatively pleaded the second action as an election of an inconsistent remedy, the plaintiff may, under a general denial in his reply, show the original election of the remedy of damages by the first action without having specially pleaded the first suit. *Babcock, Cornish & Co. v. Urquhart* 168

EMERGENCIES:

Acts of servant in, as contributory negligence, see **MASTER AND SERVANT**, 19.

EMINENT DOMAIN:

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 16.

Construction of railroad over street car tracks and determination as to expense of future safety devices, see **RAILROADS**, 2.

1. **EMINENT DOMAIN—RIGHT TO CONDEMN WATERS—JOINT USER.** Bal. Code, § 4156, providing that the rights of riparian owners to water needed for irrigation cannot be condemned, establishes the policy of this state for a joint user in many instances of waters sought to be condemned for irrigation purposes. *Spokane Valley Land & Water Co. v. Jones & Co.*..... 37

EMINENT DOMAIN—CONTINUED.

2. EMINENT DOMAIN—DRAINS—STATUTES. Laws 1895, page 142, authorizes condemnation proceedings by a county to acquire a right of way for a drainage ditch completed under the unconstitutional act, Laws 1890, p. 652. *Lewis County v. McCutcheon*..... 367
3. EMINENT DOMAIN—NECESSITY—DETERMINATION OF QUESTIONS—MUNICIPAL CORPORATIONS—NECESSITY FOR STREETS. Where a city has jurisdiction to extend its streets over tide lands, the decision of the proper municipal officers as to public use and necessity is conclusive, in the absence of fraud. *Tacoma v. Titlow*..... 217
4. SAME—PETITION—LIMITING WATERS SOUGHT—PAYMENT OF COMPENSATION OTHER THAN MONEY. In condemnation of waters of a lake for irrigation purposes, part of which are already used by littoral owners for irrigating their lands, an offer of the petitioner to exempt sufficient water to irrigate the lands of the littoral owners is not an attempt to pay damages in compensation other than money, in contravention of Const., art. 1, § 16, in view of the statute prohibiting the condemnation of waters needed for irrigation. *Spokane Valley Land & Water Co. v. Jones & Co.*..... 37
5. EMINENT DOMAIN—COMPENSATION—WAIVER—EJECTMENT—TO RECOVER RAILROAD RIGHT OF WAY—ESTOPPEL. After condemnation proceedings for a railroad right of way are instituted, the owners may by oral agreement stipulate as to the compensation and waive their constitutional right to have it paid before the land is taken; and after standing by and seeing the land used for railway purposes for many years, they cannot maintain ejectment. *Pearl Oyster Co. v. Seattle & Montana R. Co.*..... 101
6. EMINENT DOMAIN—DAMAGES—VALUE OF PROPERTY. Under Const. art. 1, § 16, providing that no private property shall be taken for public use without just compensation having been first made, the measure of damages for the taking of property is its value at the time of the trial, including improvements made since the filing of the petition, rather than its value at the time of the commencement of the proceedings. *Grays Harbor and Puget Sound R. Co. v. Kauppinen* 238
7. SAME—LIMITATIONS. Laws 1895, p. 270, limiting actions by municipal corporations to collect special assessments for any local improvement to ten years after delinquency of the assessment, applies to condemnation proceedings by a county to acquire a right of way for a drainage ditch, under Laws 1895, p. 142, constructed under a prior unconstitutional act; since such proceeding is a mere incident to the power to institute proceedings for the purpose of obtaining money to pay the costs incurred under the void act. *Lewis County v. McCutcheon* 367
8. SAME—CONSTRUCTION OF DRAINS UNDER VOID ACT—LIMITATIONS. A proceeding by a county under Laws 1895, p. 142, to provide for the payment of expenses incurred in constructing a drainage ditch un-

EMINENT DOMAIN—CONTINUED.

- der the unconstitutional act of 1890, must be commenced within a reasonable time; and a delay of more than eleven years is unreasonable. *Lewis County v. McCutcheon*..... 367
9. EMINENT DOMAIN—PROCEEDINGS—PRIORITY OF RIGHT. As between two public service corporations seeking condemnation of the same lands, the one prior in time is prior in right. *State ex rel. Public Service Corporation v. Superior Court*..... 321
10. EMINENT DOMAIN—IRRIGATION—PROCEEDINGS—AMENDMENT LIMITING WATERS SOUGHT—APPEAL—ERRORS RESERVED. In condemnation by an irrigation company of the waters of a lake, affecting the right of littoral owners to water used by them for irrigation purposes, an offer of evidence of a proposed stipulation agreeing to permit the defendants to use sufficient water to irrigate their lands, is in substance an amendment of the petition limiting the water sought to be conveyed, and error, if any, in refusing the evidence is sufficiently reserved by exceptions, without formal offer to amend the petition. *Spokane Valley Land & Water Co. v. Jones & Co.*..... 37
11. SAME—PETITION—CERTAINTY AS TO WATER RIGHTS CONDEMNED. The rule that property sought to be condemned must be described with reasonable certainty, is sufficiently complied with where, in condemnation of littoral rights and waters in a lake for irrigation purposes, the petitioner exempted such water as was necessary to irrigate the lands of the littoral owners, and showed the number of acres of their irrigable land and that five-thousandths of a cubic foot per second of time per acre was sufficient; since that gave the court a definite basis for a decree, and that is certain which can be made certain. *Spokane Valley Land & Water Co. v. Jones & Co.* 37
12. EMINENT DOMAIN—CERTIORARI—REVIEW—PARTIES ENTITLED. Upon certiorari to review a judgment in a proceeding by one public service corporation to condemn the lands of another, as having a prior right thereto, objections filed by leave of the supreme court, by a municipal corporation claiming rights in the property and that neither party is a public service corporation, will not be considered by the supreme court. *State ex rel. Cascade Public Service Corporation v. Superior Court*..... 321
13. EMINENT DOMAIN—DAMAGES—GRADE OF STREETS—INJUNCTION—DEFENSES—MUNICIPAL CORPORATIONS. In an action to restrain a city from damaging property by sloping land outside the street to a grade established, after condemning plaintiff's land within the street limits, the injunction will be denied where there was some evidence tending to show that in the condemnation suit damages for such sloping were allowed the plaintiff; notwithstanding Const. art. 1, § 16, prohibiting the damaging of property without first making compensation, as injunction is not a matter of right; and where such evidence is not clear, the plaintiff will be relegated to its action at

EMINENT DOMAIN—CONTINUED.

law for damages for injury by making the slope, leaving the city to plead anew the allowance therefor in the condemnation case. *Ferry-Leary Land Co. v. Holt & Jeffery*..... 584

EMPLOYEES:

See **MASTER AND SERVANT**.

ENACTMENT:

Of city ordinances, see **MUNICIPAL CORPORATIONS**, 4.

EQUITY:

See **TRUSTS**.

Necessity for bill of exceptions in, see **APPEAL AND ERROR**, 10.

Scope and extent of review in equitable actions, see **APPEAL AND ERROR**, 20.

Review of findings in equity, see **APPEAL AND ERROR**, 28.

Laches by stockholders in bringing suit to set aside sale of assets, see **CORPORATIONS**, 2.

Contract within statute of frauds as ground for equitable relief, see **FRAUDS, STATUTE OF**, 6.

Suits for injunctions, see **INJUNCTION**.

Relief against judgment, see **JUDGMENT**, 2-5.

1. **EQUITY—LACHES—STALE DEMANDS.** Where parties to whom an estate had been devised, subject to a life estate in the wife, delayed for fifteen years in bringing an action to set aside probate proceedings declaring the separate estate of a husband to be community property, and to set aside deeds made by them on fraudulent representations, the delay being until four months after the death of the wife, who it is alleged had fraudulently deceived the parties as to the nature of the estate, there is such gross laches as to bar the action, the heirs having for many years lived in Washington and adjoining states, some of them in the city where the judgments were matters of record and accessible, without taking any steps to contest the proceedings, although knowing that they had some interest in the estate, and making no explanations of their continued ignorance as to their rights. *Kline v. Galland*..... 504

ESTABLISHMENT:

Of trust in real property, see **TRUSTS**.

ESTOPPEL:

To take appeal, see **APPEAL AND ERROR**, 4.

To allege error in civil actions or proceedings, see **APPEAL AND ERROR**, 13, 14, 18.

To deny corporate powers, see **CORPORATIONS**, 5.

By election of remedy, see **ELECTION OF REMEDIES**.

ESTOPPEL—CONTINUED.

- To maintain ejectment after waiver of right to compensation, see **EMINENT DOMAIN**, 5.
 - To avoid or sue on insurance policy, see **INSURANCE**, 2, 10.
 - To deny existence of agency, see **PRINCIPAL AND AGENT**, 4.
 - To claim defense of fraud in action for price of corporate stock, see **SALES**, 3.
 - To assert invalidity of assessment in general, see **TAXATION**, 3.
 - Of vendee to rescind contract, see **VENDOR AND PURCHASER**, 4, 5.
1. **ESTOPPEL—WHO MAY CLAIM—PREJUDICE.** An estoppel cannot be pleaded or relied upon by one who was not injured or did not rely upon the acts constituting it. *Butler v. Supreme Court of The Independent Order of Foresters*..... 118

EVIDENCE:

- Review of rulings as dependent on presentation by record, see **APPEAL AND ERROR**, 10.
- Prejudice from error on appeal, see **APPEAL AND ERROR**, 29, 31.
- Authority of attorney to appear, see **ATTORNEY AND CLIENT**, 3.
- On bills or notes, see **BILLS AND NOTES**, 5, 7.
- Employment of broker, see **BROKERS**.
- Negligence of carrier in furnishing stock pens, see **CARRIERS**, 4, 5.
- In action for injuries to passenger, see **CARRIERS**, 7, 8.
- Of execution of note by corporation, see **CORPORATIONS**, 7.
- Insolvency of corporation, see **CORPORATIONS**, 8, 9.
- Maladministration authorizing appointment of receiver, see **CORPORATIONS**, 9.
- Testimony of accomplices, see **CRIMINAL LAW**, 2.
- Review of rulings as dependent on presentation of objections in lower court, see **CRIMINAL LAW**, 6.
- Customs or usage, see **CUSTOMS AND USAGES**.
- On recovery for hospital services and medical attendance, see **DAMAGES**.
- Of death, see **DEATH**.
- To explain latent defect in description in deed, see **DEEDS**, 1.
- Of inability to pay alimony, see **DIVORCE**, 5.
- Of forgery, see **FORGERY**, 1.
- Of good faith in conveyance between husband and wife, see **FRAUDULENT CONVEYANCES**.
- To show liability of innkeeper for loss of property of guest, see **INN-KEEPERS**, 2.
- Of larceny of money, see **LARCENY**, 2.
- Proof of possession as *prima facie* evidence of guilt, see **LARCENY**, 3.
- Of marriage, see **MARRIAGE**.
- In action for injuries to servant, see **MASTER AND SERVANT**, 18, 20-24.
- For injuries in streets, see **MUNICIPAL CORPORATIONS**, 14, 15.
- In actions by or against partnerships, see **PARTNERSHIP**.
- Existence of agency, see **PRINCIPAL AND AGENT**, 1, 2.

EVIDENCE—CONTINUED.

- Authority of agent, see **PRINCIPAL AND AGENT**, 3.
 - Corroboration of prosecutrix, see **RAPE**.
 - To aid construction of contract of sale, see **SALES**, 1, 2.
 - To defeat sufficiency of description of property to give notice in conditional bill of sale, see **SALES**, 6.
 - Reception at trial, see **TRIAL**, 1, 2.
 - Comment on, by judge in charge to jury, see **TRIAL**, 3.
 - To establish trust, see **TRUSTS**.
 - Performance by vendor by delivering deed, see **VENDOR AND PURCHASER**, 7.
 - Of defect in title of vendor, see **VENDOR AND PURCHASER**, 11.
 - For breach of contract for sale of land, see **VENDOR AND PURCHASER**, 18.
 - In actions by or against warehousemen, see **WAREHOUSEMEN**, 4.
 - Obstruction of natural water course, see **WATERS AND WATER COURSES**.
 - Competency, attendance, credibility and examination of witnesses, see **WITNESSES**.
1. **EVIDENCE—TO VARY WRITTEN CONTRACTS.** Oral evidence modifying and explaining certain letters is not inadmissible as varying a written contract, where the letters did not constitute the contract, which was oral, but only tended to show its nature and extent. *Wintermute v. Standard Furniture Co.*..... 539
 2. **EVIDENCE—PAROL TO VARY WRITING—WATER RIGHTS—CONTRACT OF SALE—CERTAINTY.** A written contract of sale requiring the vendor to defend the water right title to meadow lands and to convey one cubic foot of water per second for each hundred acres of meadow lands, there being 230 acres, is not so uncertain as to permit of evidence of an oral contemporaneous understanding to the effect that the grantors were not required to furnish that amount of water; and failure in this respect would be a breach of the contract. *Babcock, Cornish & Co. v. Urquhart*..... 168
 3. **SAME—CONTEMPORANEOUS ORAL AGREEMENT—DELIVERY OF LEASE.** Under an agreement for the delivery of a three-year lease of premises then in course of construction, which lease did not specify when the term was to commence, evidence is admissible to show a contemporaneous oral agreement whereby the lease was not to go into effect and the rent was not to commence until the building was completed. *Manvell v. Weaver*..... 408
 4. **EVIDENCE—PAROL EVIDENCE TO VARY WRITING—VENDOR AND PURCHASER—CONTRACTS.** Where, by the terms of a contract to purchase land, a cash payment of \$19,000 is to be made in 90 days, time is made of the essence, an abstract of title is to be furnished and five days allowed for examination, and if the title is not good or cannot be made good within sixty days the contract is to be void and earnest money refunded, parol evidence is inadmissible to show an

EVIDENCE—CONTINUED.

understanding that one-ninth of the title was held by minor heirs whose interest was to be acquired by probate proceedings, and that the abstract was not to be furnished until such title was acquired; as the contract cannot be varied by parol, and there is no such ambiguity in the contract as to permit parol evidence to explain it. *Sandstone, Brick & Lime Co. v. Lawler*..... 10

5. **EVIDENCE—TO EXPLAIN WRITING—CONTRACTS—AMBIGUITY.** A contract requiring the vendor of a restaurant business to deliver a lease of premises then in course of construction, which provided that the kitchen partition, dumb-waiter shafts, together with all necessary plumbing, piping, and wiring shall be done by the landlord without expense to the vendee, is ambiguous as to the cost of ventilating shafts required by law for kitchens, and oral evidence is admissible to show that the actual agreement contemplated a full equipment as a kitchen including the required ventilating system. *Manvell v. Weaver* 408
6. **EVIDENCE—WEIGHT AND SUFFICIENCY.** The undisputed testimony of an interested party is not conclusive or binding upon the court. *Brown & Bros. Mercantile Co. v. Sherrod*..... 132

EXCEPTIONS, BILL OF:

Necessity for exceptions for purpose of review, see **APPEAL AND ERROR**, 7, 8.

Presentation and reservation of grounds of review in record, see **APPEAL AND ERROR**, 11.

EXECUTION:

Of chattel mortgage, see **CHATTEL MORTGAGES**, 2.

Attacking fraudulent conveyance by levy of execution, see **FRAUDULENT CONVEYANCES**, 2.

Rights of creditor on levy and execution after forfeiture of contract by vendee, see **VENDOR AND PURCHASER**, 13.

EXEMPTIONS:

From liability for loss of goods of guest, see **INNKEEPERS**, 3.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 7-9, 11, 12.

FILING:

Delay in filing briefs, see **APPEAL AND ERROR**, 12.

Chattel mortgage, see **CHATTEL MORTGAGES**, 1, 2.

Names of partnership, see **PARTNERSHIP**.

Complaint in intervention, see **PLEADING**, 1.

FINDINGS:

Review on appeal or writ of error, see **APPEAL AND ERROR**, 26-28.

FIRE INSURANCE:

See INSURANCE, 3, 4, 11, 12.

FORCIBLE ENTRY AND DETAINER:

1. **FORCIBLE ENTRY AND DETAINER—JUDGMENT—VALIDITY.** Error in issuing a writ of restitution during the pendency of an action of forcible entry and detainer cannot be urged as ground for reversing the final judgment. *Columbia & Puget Sound R. Co. v. Moss*... 512
2. **FORCIBLE ENTRY AND DETAINER—STATUTES—CHANGE OF REMEDY.** A notice to quit served prior to the amendatory act of 1905, is not ineffectual by reason of such prior service. *Columbia & Puget Sound R. Co. v. Moss*..... 512
3. **FORCIBLE ENTRY AND DETAINER—PREMATURE ACTION—ISSUES—JUDGMENT.** In an action of forcible entry and detainer, where interveners were ousted by a provisional writ of restitution without notice, the action was premature as to them, and the final judgment should restore them to their original possession; but it is error to also restore them "to the unexpired term therein," when that was not an issue in the case. *Columbia & Puget Sound R. Co. v. Moss* 512

FORECLOSURE:

Of tax lien, see TAXATION.

FOREIGN CORPORATIONS:

See CORPORATIONS, 10, 11.

FOREIGN DIVORCE:

See DIVORCE, 7, 8.

FORFEITURE:

Of contract for nonpayment of installments, see VENDOR AND PURCHASER, 1-3, 13, 16, 17.

FORGERY:

Laws making fraudulent issuance of check a felony as imprisonment for debt, see CONSTITUTIONAL LAW, 1.

1. **FORGERY—EVIDENCE—SUFFICIENCY.** In a prosecution for issuing a check on a bank without funds to meet it, confessions of the accused and the evidence of the officer of the bank are sufficient to make a case for the jury on the question of the existence of funds in the bank. *State v. Pilling*..... 464
2. **FORGERY—ELEMENTS OF OFFENSE—VARIANCE—NAME OF PARTY DEFENDANT—SURPLUSAGE.** Technical ownership of money paid out by a bank over its counter is not material in a prosecution under Laws 1905, p. 78, defining the essential elements of an offense as the draw-

FORGERY—CONTINUED.

ing of a check on a bank for the payment of money, knowledge at the time that the drawer was without funds therein or credit, and intent to defraud; and a variance as to the ownership is immaterial, especially in view of Bal. Code, § 7132, providing that the name of the party defrauded need not be given, as the same would be surplusage. *State v. Pilling*..... 464

3. **FORGERY—INTENT TO DEFRAUD—INSTRUCTIONS—BURDEN OF PROOF.**

In a prosecution for issuing a check upon a bank without funds therein or credit to meet it, with intent to defraud, under Laws 1905, p. 78, it is error to instruct that the law would presume intent to defraud from the issuing of a check knowing that the accused had no funds or credit to meet its payment; since it was at least only a rebuttable presumption, and the most that the court could do would be to leave it to the jury to infer the fraud, the burden of proof of which was upon the state. *State v. Pilling*..... 464

4. **SAME—APPEAL—REVIEW.** Such an instruction would not be cured by other general instructions disassociated therefrom. *State v. Pilling* 464**FORMER ADJUDICATION:**

See JUDGMENT, 2, 6-9.

FRANCHISE:

Amendment of franchise ordinance at time of passage, see MUNICIPAL CORPORATIONS, 4.

Taxation of Federal franchises, see TAXATION, 1-3.

FRAUD:

As affecting validity of negotiable instruments, see BILLS AND NOTES, 5.

Substituted service and name of defendant in summons, see DIVORCE, 8.

As defense in action for price, see SALES, 3.

FRAUDS, STATUTE OF:1. **FRAUDS, STATUTE OF—DEBT OF ANOTHER—COLLATERAL OR ORIGINAL PROMISE.** Where a building contract recited that it is between, and it was signed by, the contractor, as party of the first part, and the owner as party of the second part, the obligation of alleged sureties also signing the contract is a collateral and not an original undertaking, and is within the statute of frauds. *Mead v. White*..... 6382. **FRAUDS, STATUTE OF—INTEREST IN LANDS—LICENSES.** When an oral contract for the sale of standing timber to be cut immediately is executed, it cannot be attacked as affecting an interest in lands, within the statute of frauds; since, if not valid as a sale of personal property, it is valid as a license to enter and sever the timber. *Bay View Land Co. v. Ferguson*..... 323

FRAUDS, STATUTE OF—CONTINUED.

3. **FRAUDS, STATUTE OF—PAROL LEASE FOR YEARS—PERFORMANCE.** A parol lease of a logging right of way for a longer period than one year will not be set aside at the instance of the landlord, where the lessee took possession with the lessor's consent, constructed a road at an expense of \$5,000, benefited the land by ditches, and purchased the lessor's timber as an incident to procuring the right of way; as such course would be inequitable. *Northcraft v. Blumauer*..... 243
4. **FRAUDS — STATUTE OF — BROKERS — CONTRACTS FOR COMMISSIONS.** Where a written contract for a broker's commissions on a percentage basis was abrogated on negotiating a sale, and a flat commission of \$500 orally agreed upon, and the contract of sale made no reference to commissions except to provide that purchase money paid should, in case of default, be forfeited to the agents "to the extent of their agreed upon commissions," the second contract is not a mere modification of the first; and the contract of sale is insufficient as a memorandum of the agreement for commissions to entitle the broker to recover commissions under the statute of frauds requiring any agreement authorizing a broker to sell real estate for a commission to be in writing. *Forland v. Boyum*..... 421
5. **SAME—MEMORANDUM.** The contract of persons who sign "as sureties," at the foot of a written building contract between the contractor and the owner, is not in writing, and is void as within the statute of frauds, where the writing contains no provision connecting the sureties with it or showing their relation to the parties. *Mead v. White*..... 638
6. **SAME—VOID CONTRACT—REFORMATION.** A contract, void within the statute of frauds, cannot be reformed upon parol evidence. *Mead v. White*..... 638

FRAUDULENT CONVEYANCES:

1. **FRAUDULENT CONVEYANCE—HUSBAND TO WIFE—EVIDENCE OF GOOD FAITH—BURDEN OF PROOF.** Under Bal. Code, § 4580, casting the burden of proof upon one asserting good faith in transactions between husband and wife, a deed from the husband to a wife in consideration of love and affection is not shown to have been made in good faith, where it was made on the same day that suit was brought against the husband, and before judgment the husband and wife joined in a deed of other property which was admittedly a fraud upon creditors; and a mere assertion by the wife that there was no collusion is not sufficient under the circumstances. *Adams v. Wingard* 560
2. **SAME—RETURN OF NULLA BONA—SOLVENCY OF GRANTOR—BURDEN OF PROOF.** Where a creditor made at different times two conveyances in fraud of creditors, a return of an execution *nulla bona* is *prima facie* evidence that there was no other property out of which to satisfy the debt, subjecting both conveyances to attack; and the

FRAUDULENT CONVEYANCES—CONTINUED.

burden is upon the defendants to show affirmatively that the second conveyance, which was set aside, was sufficient to satisfy the debt, in order to sustain the first conveyance on the theory of solvency at that time. *Adams v. Wingard*..... 560

GOOD FAITH:

Of purchaser, see **BILLS AND NOTES**, 2-4.

In execution of conveyance, see **FRAUDULENT CONVEYANCES**, 1.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 29-33.

In criminal prosecutions, see **CRIMINAL LAW**, 7.

HEARING:

Continuance of hearing on assessment for sewers, see **MUNICIPAL CORPORATIONS**, 7.

HIGHWAYS:

Defects or obstructions in city streets, see **MUNICIPAL CORPORATIONS**, 12-15.

1. **HIGHWAYS—DUTY TO MAINTAIN—USE OUTSIDE HIGHWAYS—BARRIERS.** A county is liable for injuries sustained by a traveler by team, who fell into a washout in close proximity to a road of such a dangerous character that barriers should have been erected, where the place outside the road line had been used as a part of the county road and as a continuance thereof, without being marked off therefrom, so that persons using ordinary care would be liable to drive thereon. *Neel v. King County*..... 490
2. **SAME—INSTRUCTIONS AS TO DUTY—INSURER OF SAFETY.** In an action for injuries sustained by a traveler by team in falling into a washout, along a county road, an instruction requiring a county to maintain its highways in a reasonably safe condition for public travel, is not erroneous in that it makes a county an insurer of the safety of its roads, where by other instructions the jury were told the county would not be liable on account of the washout unless ordinary prudence would have anticipated and guarded against it. *Neel v. King County*..... 490

HOTELS:

Liability of innkeeper for loss of property of guest, see **INNKEEPERS**.

HUSBAND AND WIFE:

Authority of husband to employ attorney to represent community interests, see **ATTORNEY AND CLIENT**, 3.

Divorce and judicial separation, see **DIVORCE**.

HUSBAND AND WIFE—CONTINUED.

Conveyances fraudulent as to husband's creditors, see **FRAUDULENT CONVEYANCES**.

Marriage and annulment thereof, see **MARRIAGE**.

Claim by married woman for personal injuries, see **MUNICIPAL CORPORATIONS**, 22.

1. **HUSBAND AND WIFE—CONVEYANCES—SEPARATE PROPERTY OF WIFE.** A trade of separate property of two wives, arranged by their husbands, is ratified by the wives by their joining in deeds of the property. *Coonrod v. Studebaker*..... 32
2. **HUSBAND AND WIFE—PERSONAL INJURIES TO WIFE—RIGHT OF ACTION.** A married woman living separate and apart from her husband may maintain an action in her own name for personal injuries sustained by her, under Bal. Code, § 4826, subd. 3. *Horton v. Seattle* 316

IMPANELING:

Selection and drawing of jury, see **JURY**.

IMPEACHMENT:

Of recitals of judgment, see **JUDGMENT**, 6.

IMPLIED TRUSTS:

See **TRUSTS**, 4.

IMPRISONMENT:

For debt as violation of constitutional guaranty of personal liberty, see **CONSTITUTIONAL LAW**, 1.

IMPROVEMENTS:

As element of compensation for appropriation of land, see **EMINENT DOMAIN**, 6.

Possession and improvements as part performance to satisfy statute of frauds, see **FRAUDS, STATUTE OF**, 3.

INDEMNITY:

1. **INDEMNITY—CONTRACTOR'S BOND—NOTICE OF ACTS INVOLVING LOSS—RELEASE OF SURETY.** A bond guaranteeing the performance of a building contract, which stipulates for immediate notice of any breach of the contract, does not require notice of every act constituting a default, but the owner may wait until claimants seek to make their claims charges against the property. *Martin v. Empire State Surety Co.*..... 290
2. **SAME—ACTIONS ON BOND—ACCRUAL—DATE OF FIRST BREACH—WAIVER—LIMITATIONS.** A contractor's bond providing that action must be instituted within six months after the first breach of the contract does not require suit within such time upon any breach

INDEMNITY—CONTINUED.

that is waived by the owner without prejudice to the surety; and the owner may wait until claims are sought to be made liens upon the property, tender the defense of the actions to the surety, and later sue to recover the judgment paid and expenses. *Martin v. Empire State Surety Co.*..... 290

3. **SAME—AGREEMENT ALTERING CONTRACT.** A surety on a contractor's bond is not released by a secret understanding between the owner and contractor to the effect that the owner might desire an accommodation by acceptance of a mortgage, in lieu of the last payment; especially where the contractor defaulted and payment was made in cash. *Martin v. Empire State Surety Co.*..... 290
4. **SAME—RELEASE OF SURETY—FAILURE TO MAKE PAYMENT.** A surety on a contractor's bond cannot claim a release by the owner's failure to make a payment due the contractor, when it does not appear that the payment was demanded or any certificate presented therefor, or that failure to pay caused the contractor's default. *Martin v. Empire State Surety Co.*..... 290

INDICTMENT AND INFORMATION:

See LARCENY.

INDORSEMENT:

Of bill or promissory note, see **BILLS AND NOTES**, 1, 7.

INFANTS:

Custody and support on divorce of parents, see **DIVORCE**, 4, 6.

Care required of master of minor servant, see **MASTER AND SERVANT**, 1, 5, 14, 17, 25.

Redemption of land from tax sale, see **TAXATION**, 8, 9.

1. **INFANTS—LACHES—REPUDIATION OF CONTRACT.** Where a minor, before majority, gave a deed of his interest in an estate, and, after becoming of age, failed to promptly repudiate the deed, and only commenced action within three days of the year limited therefor to set aside the probate proceedings, which had been a matter of record for fifteen years, he is guilty of laches barring a recovery, regardless of the statute of limitations. *Kline v. Galland*..... 504

INITIATIVE AND REFERENDUM:

Adoption of plan by city, see **MUNICIPAL CORPORATIONS**, 1-3.

INJUNCTION:

Taking of or injury to private property, see **EMINENT DOMAIN**, 13.

Interference with waters of lake, see **WATERS AND WATER COURSES**.

1. **INJUNCTION—GROUNDS—COTENANTS—IRREPARABLE DAMAGE—EVIDENCE—SUFFICIENCY.** In an action between cotenants the evidence fails to show such substantial or irreparable injury as to warrant

INJUNCTION—CONTINUED.

an injunction to restrain the partitioning of a common entrance to a building, where the area or recess in the building would have been divided so as to give defendant a four-foot passageway to a stairway and the plaintiff a six-foot entrance to the back door of its saloon, without any appreciable interference with light; since injunction will rarely be granted in favor of a cotenant except in case of insolvency or partial destruction of the estate. *Tift Co. v. State Medical Institute* 365

2. **INJUNCTION—TEMPORARY SUSPENSION.** A temporary restraining order until the hearing is not continued in force by an order at the hearing to the effect that all orders theretofore made in the case be held in "obeyance" during the pendency of the action, the word used evidently being an error for "abeyance," suspending all previous orders, and not intended in the sense that the orders were to be "obeyed." *Drainage District No. 1 v. Costello*..... 67

INNKEEPERS:

Note given for room rent as settlement of claim against innkeeper for loss of property, see **COMPROMISE AND SETTLEMENT**.

1. **INNKEEPERS—LOSS OF PROPERTY—BURDEN OF PROOF.** Upon proof of the loss of personal property from the room of a guest at a hotel, the burden of proof is upon the innkeeper to show facts exonerating him from liability. *Watt v. Kilbury*..... 446
2. **SAME—LOSS BY GUEST—EVIDENCE—SUFFICIENCY.** The evidence was sufficient to fix upon an innkeeper, as the insurer of the property of his guest at common law, liability for loss of a lady's hand bag containing a gold watch and \$460 in money, which the guest left upon her bed while absent from the room for a few minutes, notwithstanding a conflicting statement made by the guest, an old lady in ill health, while greatly agitated over the loss. *Watt v. Kilbury* 446
3. **INNKEEPERS—LOSS BY GUESTS—EXEMPTION BY NOTICE—STATUTES—COMPLIANCE.** A hotel keeper is not exempted from liability for the loss of property of guests under Bal. Code, § 5977, where he failed to keep an iron safe or vault in good order for the custody of valuables, and failed to post a copy of the statute in the sleeping rooms, as required by the act; as the act must be exactly complied with to relieve from liability. *Watt v. Kilbury*..... 446

INSANE PERSONS:

Effect of suicide of insured while insane, see **INSURANCE**, 8, 9.

INSOLVENCY:

Of corporation, see **CORPORATIONS**, 8, 9.

Of fraudulent grantor, see **FRAUDULENT CONVEYANCES**, 2.

As ground for injunction, see **INJUNCTION**, 1.

INSTRUCTIONS:

Review as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 8.

In criminal prosecution, see CRIMINAL LAW, 2; FORGERY, 4.

In civil actions, see TRIAL, 3-5.

INSURANCE:

Death of insured presumed from absence, see DEATH.

1. INSURANCE—AGENTS—AUTHORITY. An insurance broker is the agent of an insurance company where it appears that it represented the company with the knowledge of the company's local agent, who was employed by the broker and who demanded refunds in the name of the broker. *Ryder-Gougar Co. v. Garretson*..... 71
2. INSURANCE—BENEFICIARY SOCIETIES—RECEIPT OF PREMIUMS—ESTOPPEL. A beneficiary association, cannot, after death of the insured, allege that it had no authority to issue a certificate guaranteeing a policy of another association which had been merged by it, where it had received and receipted for the premiums paid thereon. *Campbell v. Order of Washington*..... 398
3. INSURANCE—POLICY—PROPERTY COVERED—ADDITION ATTACHED—CONSTRUCTION. A policy of fire insurance upon a stable, "and additions attached thereto," covers an extension of the main floor excavated underneath an alley at the rear and the basement of a building across the alley on higher ground, used for horse stalls and the storage of vehicles; since "attached" has the meaning of "connected" or "joined to," and the policy is to be construed most strongly against the company. *Montana Stables v. Union Assurance Society* 274
4. INSURANCE—POLICY—LIMITING AMOUNT OF LOSS. Under the terms of a policy of fire insurance and Laws 1903, p. 147, limiting liability for loss by fire to three-fourths of the actual value of bar fixtures, \$280, judgment for the full sum is excessive, and should be reduced to \$210. *Olympia Brewing Co. v. Pioneer Mutual Insurance Association* 16
5. INSURANCE—AGENTS—LIABILITY TO REFUND COMMISSIONS. Agents who receive a portion of an insurance commission upon a policy secured by them for other or principal agents, under an agreement or general custom to refund the same in case of cancellation of the policy, are liable to the principal agents for the portions received, after the principal agents have, on orders from the company, cancelled the policy and refunded the whole premium paid by the insured. *Ryder-Gougar Co. v. Garretson*..... 71
6. INSURANCE—POLICY—STIPULATION FOR CANCELLATION—CONTRACT FOR LOAN—PLEDGES. A stipulation in a life insurance policy, pledged as security for a loan, authorizing the company, upon a default, to cancel the policy without notice, and apply the cash surrender con-

INSURANCE—CONTINUED.

- sideration to the payment of the loan, is valid; and where the loan equals the cash surrender value, the insured's rights are terminated by cancellation of the policy after default. *Sherman v. Mutual Life Insurance Co.* 523
7. SAME—WAIVER—EXTENSION OF TIME. In such a case, extension of the loan for one year is not a waiver of the stipulation authorizing a cancellation, where the insured was not misled, and appears to have treated his rights as terminated. *Sherman v. Mutual Life Insurance Co.* 523
8. INSURANCE—BENEFICIARY CERTIFICATE—NONLIABILITY CLAUSE—"INVOLUNTARY" SUICIDE—CONSTRUCTION—INSTRUCTIONS TO JURY. In an action upon a beneficiary certificate containing a nonliability clause in case the deceased member die "by his own hands whether sane or insane at the time, whether the act be voluntary or involuntary," there is no liability in case of an involuntary suicide; and it is error to instruct the jury to find for the plaintiff if they find the deceased did not commit suicide, which means to "intentionally do some act to intentionally cause his death." *Campbell v. Order of Washington* 398
9. SAME—TRIAL—INSTRUCTIONS—ISSUES NOT SUBMITTED. In an action upon a beneficiary certificate, in which there are issues as to the plaintiff's exhausting her right of appeal in the society, it is error to instruct the jury to bring in a verdict for the plaintiff if they find in her favor upon the defense of suicide. *Campbell v. Order of Washington*..... 398
10. SAME—DEFENSES—ESTOPPEL—INCONSISTENT CLAIM IN PRIOR ACTION—MUTUALITY—PREJUDICE. A wife who, upon advice of counsel, secured a divorce for the purpose of clearing up the title to real estate (her husband having suddenly disappeared some years before without any explanation, and all efforts to find trace of him having failed) is not estopped, after the lapse of seven years from the date of his disappearance, from bringing an action on a benefit certificate upon his life and claiming therein that he was dead at the time the action for divorce was commenced; especially where such estoppel would not be mutual and did not mislead or injure the other party. *Butler v. Supreme Court of The Independent Order of Foresters.* 118
11. INSURANCE—ACTIONS—PLEADINGS—REPLY—ISSUES AND PROOF—SCOPE OF GENERAL DENIAL—UNNECESSARY AFFIRMATIVE DEFENSE—PREMIUMS—POLICY—WAIVER OF CONDITION REQUIRING PAYMENT. In an action upon a fire insurance policy in which the defendant answered that part of the premium was past due and unpaid, under a policy providing that the company was not liable for a loss occurring in such case, a general denial in the reply permits, as within the issues, evidence on the part of the plaintiff that the company waived payment of a portion of the premium and extended a credit for the balance due, irrespective of an affirmative defense in the reply that the

INSURANCE—CONTINUED.

- original contract called for payment of the premium in installments; hence failure of the plaintiff to prove such affirmative defense is immaterial where, under the general denial, it proved the waiver; such a waiver keeping the policy in force. *Olympia Brewing Co. v. Pioneer Mutual Insurance Association*..... 16
12. SAME—BURDEN OF PROOF. In such a case, the burden of proof is upon the defendant to show that part of the premium was unpaid and past due. *Olympia Brewing Co. v. Pioneer Mutual Insurance Association* 16

INTEREST:

Inclusion of accumulated interest on reassessment for public improvements, see MUNICIPAL CORPORATIONS, 9.

INTERPRETERS:

Appointment of in criminal prosecution, see CRIMINAL LAW, 3.

INTERVENTION:

Time for filing complaint in intervention, see PLEADING, 1.

INTOXICATING LIQUORS:

1. INTOXICATING LIQUORS — LICENSES — STATUTES — IMPLIED REPEAL. Bal. Code, § 2934, providing that the mayor and council of each city shall have the sole and exclusive authority to license or prohibit the sale of intoxicating liquors is impliedly repealed by Bal. Code, § 739, conferring upon cities of the first class power to frame their own charters and to regulate the sale of intoxicating liquors. *Hartig v. Seattle* 432
2. SAME—STATUTES—CONFLICT—GENERAL AND SPECIAL LAWS. The city council of Seattle has exclusive power to license the sale of liquor without submitting the question to a vote of the people under the initiative and referendum amendment to the charter of the city covering "any ordinance dealing with any matter within the realm of local affairs or municipal business," and under the concurrent amendment No. 11, especially conferring upon the city council the power to license and regulate the sale of liquor; since special concurrent laws obtain as against a conflicting general law. *Hartig v. Seattle* 432

IRREPARABLE INJURY:

As ground for injunctive relief, see INJUNCTION, 1.

IRRIGATION:

Condemnation of waters for, see EMINENT DOMAIN, 1, 4, 10, 11.

JOINT TORT FEASORS:

See MASTER AND SERVANT, 13.

JOINT USER:

Of water condemned for irrigation purposes, see **EMINENT DOMAIN**, 1.

JUDGES:

Comment on evidence, review on appeal, see **APPEAL AND ERROR**, 7.

Conduct of judge in civil trial, see **TRIAL**, 3.

JUDGMENT:

See **FORCIBLE ENTRY AND DETAINER**.

Showing of adverse possession to vacate default judgment in ejectment, see **ADVERSE POSSESSION**, 2.

Review in general, see **APPEAL AND ERROR**.

Remand, entry and proceedings on appeal, see **APPEAL AND ERROR**, 36-41.

Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 34, 35, 37.

Prejudicial error in entry, see **APPEAL AND ERROR**, 32.

Conclusiveness on appeal of recitals in order refusing withdrawal of plea of guilty, see **CRIMINAL LAW**, 5.

Dismissal on merits as bar to another action, see **DIVORCE**, 1, 2.

Foreign divorce decrees, see **DIVORCE**, 7, 8.

Excessive recovery under policy limiting loss by fire, see **INSURANCE**, 4.

Effect of judgment against one joint tortfeasor, see **MASTER AND SERVANT**, 13.

Conclusiveness in proceedings to assess property for local improvement, see **MUNICIPAL CORPORATIONS**, 10.

Summons by publication sufficient to confer jurisdiction to enter default judgment, see **PROCESS**.

Entry of personal judgment for costs, see **TAXATION**, 6.

1. **JUDGMENTS—DIVORCE—FAILURE TO RECORD—EFFECT—CERTIFICATE.** The failure of the clerk of a foreign court to perform the clerical duty of recording a judgment of divorce, as required by statute to make the judgment effective, does not affect its validity, and a certificate of the clerk that it was not recorded, contradicting a former certificate that it was recorded, is therefore properly disregarded. *Douglas v. Teller*..... 695
2. **JUDGMENT—BAR—RES JUDICATA—MATTERS CONCLUDED.** The denial of a motion to vacate a judgment, upon the ground of inadvertence and surprise, from which no appeal was prosecuted, is *res judicata* in an action in equity to set aside the judgment upon the same grounds. *Bunch v. Pierce County*..... 298
3. **JUDGMENTS—ACTIONS TO SET ASIDE—LIMITATIONS—EXCUSE.** An action in equity to set aside a judgment must be brought within one year, and it is no excuse that plaintiff mistook his remedy until after the year had expired. *Bunch v. Pierce County*..... 298

JUDGMENT—CONTINUED.

4. JUDGMENTS—VACATION—EQUITY—LACHES—DELAY IN SUIT AFFECTING TITLES. A suit in equity to set aside judgments affecting the title to numerous lots will be dismissed for want of equity, where there was gross and unexplained laches in failing to commence the action for many years after entry of the judgments. *Washington Dredging & Improvement Co. v. State*..... 346
5. JUDGMENT—VACATION—COLLATERAL, ATTACK — PROCESS — CORPORATIONS. Where a default judgment against a corporation is regular on its face and recites due personal service, the acceptance of service by a *de facto* vice president cannot be attacked by a complaint in intervention, but only by direct attack on the judgment by motion or petition, under Bal. Code, §§ 5153, 5156. *Seattle & Northern R. Co. v. Bowman*..... 416
6. JUDGMENT—RECITALS—CONCLUSIVENESS—IMPEACHMENT. Upon a plea of former adjudication, it is not admissible to impeach the recitals of the former judgment showing it to have been a dismissal on the merits, by evidence of the judge, clerk and stenographer at the former trial that the motion granted was one of nonsuit and not on the merits. *McGuire v. Bryant Lumber & Shingle Mill Co.*... 425
7. JUDGMENT—BAR—RECITALS—DISMISSAL AND NONSUIT. In an action for personal injuries, a judgment, entered on motion of the defendant at the close of plaintiff's case, is a final judgment on the merits barring a subsequent action for the same cause, and not a judgment of nonsuit, where it recites that "plaintiff failed to establish that the defendant had been negligent at all or that plaintiff's injuries were the consequence of its negligence and because of such determination on the part of the court it enters judgment in favor of defendant." *McGuire v. Bryant Lumber & Shingle Mill Co.*.... 425
8. JUDGMENTS—PERSONS CONCLUDED—NOTICE TO DEFEND—SUFFICIENCY—COVENANTS. A written notice to defend an action is sufficient, where vendors had warranted the title to personal property, the vendee gave notice that an administrator of the estate of H., deceased, had filed his petition in said estate claiming title to the property and claiming that vendors' title rested upon a fraudulent conveyance by the supposed widow of said deceased, that the vendee had been ordered to appear at a certain time to show cause before the Hon. R. B. Albertson why a receiver should not be appointed, and the notice required the vendors to appear and defend said action. *Bevan v. Muir*..... 54
9. JUDGMENT—RES JUDICATA—MATTERS THAT MIGHT HAVE BEEN LITIGATED. A judgment perpetually enjoining an irrigation company from lowering the waters of a lake, claimed by littoral owners by prior appropriation, is *res judicata* in a subsequent action by the irrigation company to condemn the right to use the waters, and concludes the company from asserting in the condemnation suit that the littoral owners had not appropriated the waters and that the

JUDGMENT—CONTINUED.

same were open to appropriation by it by virtue of an act of Congress; since such question might have been litigated in the former action. *Spokane Valley Land & Water Co. v. Jones & Co.*..... 37

JUDICIAL SALES:

Of land for nonpayment of taxes, see **TAXATION**, 4, 7-11.

JURISDICTION:

Appellate jurisdiction, see **APPEAL AND ERROR**.

Effect of appearance, see **APPEARANCE**, 2.

Of court to compel trust conveyance for children after remarriage of parents, see **DIVORCE**, 6.

Sufficiency of summons for jurisdictional purposes, see **PROCESS**.

JURY:

Right to trial by jury in disbarment proceedings, see **ATTORNEY AND CLIENT**, 2.

Instructions in civil actions, see **TRIAL**, 3-5.

1. **JURY—IMPANELING—DRAWING BY CLERK.** Where, in drawing a jury, the usual practice is followed, the ballots are taken from the box by chance, and an impartial jury results, error cannot be predicated on the manner in which the clerk conducted the drawing when selecting the jury, the statute not being clear as to the exact method of drawing. *Mercereau v. Maughlin Mill Co.*..... 475

JUSTICE OF THE PEACE:

Restraining proceeding with criminal prosecution, see **PROHIBITION**.

KNOWLEDGE:

Defenses to bills or notes, see **BILLS AND NOTES**, 3.

Effect of, on laches, see **EQUITY**.

Servant's knowledge of defect or danger as element of assumption of risk by servant, see **MASTER AND SERVANT**, 14, 15, 17, 18, 24, 26.

LACHES:

As defense in action by stockholders to set aside sale of assets, see **CORPORATIONS**, 2.

Effect on equity, see **EQUITY**.

As bar to action by minor, see **INFANTS**.

Delay in bringing action to vacate judgment, see **JUDGMENT**, 4.

LAKES:

See **WATERS AND WATER COURSES**.

LANDLORD AND TENANT:

Laws as affecting construction of contract for lease, see **CONTRACTS**.

Parol evidence to explain lease, see **EVIDENCE**, 3, 5.

Requirements of statute of frauds as to lease, see **FRAUDS, STATUTE OF**, 3.

Liability of purchaser in possession for rents prior to rescission of contract, see **VENDOR AND PURCHASER**, 8.

1. **LANDLORD AND TENANT—USE OF PREMISES—WASTE.** The graveling of a leased right of way for a logging road that was to have been timbered is not such waste as to warrant a cancellation of the lease, where the rental value of the land was not impaired, drainage ditches benefited the land in excess of the damage, and the lessee can be compelled to remove the gravel or respond in damages at the end of the term. *Northcraft v. Blumauer*..... 243

LARCENY:

1. **LARCENY—INFORMATION—DESCRIPTION OF ANIMALS ON RANGE—SUFFICIENCY.** An information for the larceny of fifty-one horses running on the range, described as mares and geldings belonging to the state, is sufficient under the statute, although there was no specific description of the several animals sufficient to identify them in any subsequent prosecution. *State v. McIntyre*..... 178
2. **LARCENY—MONEY—EVIDENCE—SUFFICIENCY.** A conviction of larceny of United States money is sustained where a witness stated that he was familiar with United States money, that it was United States currency, and looked like United States money, and described the denomination of the bills, although in an isolated answer on cross-examination he admitted it might have been Canadian money. *State v. Jones*..... 142
3. **LARCENY—ANIMALS ON RANGE—RECENT POSSESSION—PRESUMPTIONS—DIRECT EVIDENCE—EFFECT.** In a prosecution for larceny of horses running on the range, the state is entitled to the benefit of the presumption of guilt given by Bal. Code, § 7114, which provides that proof of possession of such animals shall be *prima facie* evidence that possession was acquired recently, and shall cast the burden of explanation upon the defendant; although there was direct evidence on the part of the state that the horses were feloniously taken from the range by the accused, as the presumption is only cumulative of the direct evidence. *State v. McIntyre*..... 178

LAW OF THE CASE:

Decision on appeal, see **APPEAL AND ERROR**, 34, 35.

LEASES:

See **LANDLORD AND TENANT**.

Oral leases as within statute of frauds, see **FRAUDS, STATUTE OF**, 3.

LEGISLATIVE POWER:

See MUNICIPAL CORPORATIONS, 1-3.

LICENSES:

License to occupy land as within statute of frauds, see FRAUDS, STATUTE OF, 2.

Sale of intoxicating liquors, see INTOXICATING LIQUORS.

LIENS:

Mortgage, see CHATTEL MORTGAGES, 3, 4.

Liens of mechanics and materialmen, see MECHANICS' LIENS.

For labor and supplies to railroads, see RAILROADS, 3, 4.

Title and proviso as extending act providing for liens for labor performed and materials furnished, see STATUTES, 1.

Tax lien, see TAXATION.

Charges for storage of goods, see WAREHOUSEMEN, 4.

LIFE INSURANCE:

See INSURANCE, 2, 6-10.

LIMITATION OF ACTIONS:

Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 9.

Compelling county to reassess property benefited by drains, see DRAINS.

Obtaining right of way and payment of expenses in constructing drainage ditch under void act, see EMINENT DOMAIN, 7, 8.

Laches, see EQUITY.

Accrual of action on bond for breach of contract, see INDEMNITY.

Laches in repudiating contract as affecting period of limitation, see INFANTS.

To vacate judgment, see JUDGMENT, 3.

Time for demand for refund of excessive assessment, see MUNICIPAL CORPORATIONS, 17-21.

LIMITATION OF LIABILITY:

Of carrier in carriage of live stock, see CARRIERS, 3-5.

Of risks and liability of insurers, see INSURANCE, 4.

LIQUORS:

See INTOXICATING LIQUORS.

LIVE STOCK:

Liability of carrier for loss, see CARRIERS, 3-5.

LOTTERIES:

1. **LOTTERIES—CONTRACT—CONSTRUCTION—"PURCHASERS."** An offer of a prize to the "purchasers" of a lot in a townsite cannot, before completion of his contract, be taken advantage of by one who had entered into the usual land contract for purchase on installments, title remaining in the vendor until all payments were made, with right of forfeiture in case of default. *Younkman v. Hillman*..... 661

MACHINERY:

Liability of employer for defects, see **MASTER AND SERVANT**, 2, 3, 14, 21.

MANDAMUS:

Limitation of action to compel a reassessment on property benefited by a drain, see **DRAINS**.

To compel operation of through trains, see **RAILROADS**, 5, 6.

MANDATE:

To lower court on decision on appeal or writ of error, see **APPEAL AND ERROR**, 37-41.

MARKETABLE TITLE:

See **VENDOR AND PURCHASER**, 9, 10.

MARRIAGE:

1. **MARRIAGE—VALIDITY—PRESUMPTION.** All presumptions both of law and fact will aid findings of fact in support of the validity of a marriage. *Thomas v. Thomas*..... 297

MASTER AND SERVANT:

Liability of principal for acts of agent, see **PRINCIPAL AND AGENT**, 4.

1. **MASTER AND SERVANT—DUTY OF MASTER—INSTRUCTIONS TO JURY.** Instructions as to the duty of a master to a youthful employee are not erroneous as assuming questions proved, where they were but the statement of general rules under the issues, and other instructions properly submitted such issues to the jury. *Gage v. Springston Lumber Co.* 108
2. **MASTER AND SERVANT—SAFE APPLIANCES AND PLACES—DUTY—INSTRUCTIONS.** It is proper to instruct that a master owes the positive duty to his servants to use reasonably safe appliances and to use reasonable care to provide a reasonably safe place to work. *Olson v. Erickson* 458
3. **SAME—SAFE PLACE—SCAFFOLDS—INSTRUCTIONS.** In an action for injuries sustained by a fall from a scaffold furnished by defendant for plaintiff to work on, the court properly refused to charge the jury that the plaintiff cannot recover unless he proves by a fair

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- preponderance of the evidence his allegations that plaintiff orally agreed to furnish a safe and secure scaffold, since the law would imply that the scaffold was to be safe and secure; especially where the point was in effect covered by another instruction. *Cleary v. General Contracting Co.*..... 254
4. **MASTER AND SERVANT—RAILROADS—NEGLIGENCE—CONSTRUCTION OF SIDETRACKS.** It is not negligence rendering a railroad company liable to its locomotive fireman, struck by a passing train while cleaning out his engine on a sidetrack, that the sidetracks were constructed so near the main line that plaintiff was struck while so engaged, if the tracks are far enough apart to permit trains to pass in safety. *Raines v. Great Northern R. Co.*..... 570
5. **SAME—NEGLIGENCE OF MASTER—FAILURE TO WARN—RAILROADS—SIGNALS.** In such a case the company is not guilty of negligence in sending the boy into private switch yards where none but employees were allowed, without warning him, nor in switching cars without whistles and signals which would only create confusion in the yards. *Ryan v. Northern Pac. R. Co.*..... 279
6. **MASTER AND SERVANT—VICE PRINCIPALS—EVIDENCE—CONCLUSION OF WITNESS.** The statement by plaintiff and his expert witness that in their opinion a head sawyer in a mill was in full charge of all the workmen, negatived by the facts detailed, is a mere conclusion and of no probative force. *Larsen v. Covington Lumber Co.*..... 146
7. **MASTER AND SERVANT—SAFE PLACE—DELEGATION OF DUTY—SIGNALMAN—FELLOW SERVANTS.** Where a stevedore, stowing piles in the hold of a ship, was injured through the premature starting of the cable, the master's duty to control the cable affects the safety of the place, and cannot be delegated to a fellow servant; and the negligence of a signalman in giving the wrong signal is that of a vice principal. *Westerlund v. Rothschild.*..... 626
8. **SAME—FELLOW SERVANTS—HEAD SAWYER AND TALLYMAN.** The head sawyer in a mill (the sawyer in charge of the "head" saw) is not a vice principal as to a tallyman, marking the lumber after it had been cut, who was not in the sawyer's crew and over whom the sawyer had no control in the performance of his duties. *Larsen v. Covington Lumber Co.*..... 146
9. **SAME—VICE PRINCIPALS—SUPERVISION—DETAILS OF WORK.** The direction by a gang foreman to one common laborer to go with another who would tell him what to do in the unloading of cars of lumber, does not make such other a vice principal, as to incidental acts and details while working together in unloading the lumber. *Jock v. Columbia & Puget Sound R. Co.*..... 437
10. **MASTER AND SERVANT—VICE PRINCIPALS—SUPERINTENDENCE.** A foreman in charge of moving a steam shovel car, whose duty it was

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- to direct when certain acts should be performed by others, is a vice principal, as his duties are those of superintendence which are non-delegable. *Olson v. Erickson*..... 458
11. **MASTER AND SERVANT—FELLOW SERVANTS—DIFFERENT DEPARTMENTS.** A saw filer under direction of the foreman of a mill is not a fellow servant of a dogger who works under the head sawyer, as to an injury inflicted by the filer's raising a jump saw without warning, in an unusual manner, just as the dogger was stepping over the slot on his way out of the mill. *Jackson v. Danaher Lumber Co.* 596
12. **MASTER AND SERVANT—FELLOW SERVANTS—COMMON EMPLOYER.** A common laborer, directing and assisting in the unloading of a car of lumber, is a fellow servant as to another laborer who was caught by the falling of the lumber upon chopping off the last of the side stakes holding the lumber; since they were engaged in a common simple service, each assisting the other in the details of the work, and the injured servant had opportunities to protect himself against the alleged negligence of the other in removing props supporting the lumber. *Jock v. Columbia & Puget Sound R. Co.*..... 437
13. **MASTER AND SERVANT—JOINT TORT FEASORS—JUDGMENT—TRIAL—VERDICT.** In an action against a company and its master mechanic for personal injuries to an employee, where the only negligence alleged was that of the master mechanic in failing in the inspection of a motor, a verdict exonerating the master mechanic exonerates the company, and precludes any judgment against either defendant. *Morris v. Northwestern Improvement Co.*..... 451
14. **MASTER AND SERVANT—YOUTHFUL EMPLOYEE—ASSUMPTION OF RISKS—QUESTION FOR JURY.** In an action by a youth 15 years of age, injured on a cut-off saw, whether the dangers were obvious and ought to have been avoided is for the jury, where it appears that he was put to work on the saw, which was out of repair and unsafe, without being warned of the increased hazards. *Gage v. Springston Lumber Co.* 108
15. **MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REMEDY—INCOMPETENT CO-SERVANTS.** An action by a sawyer for injuries sustained through the negligent employment of an incompetent co-servant as a setter does not fall within the rule that a servant does not assume the risks where he continues in the service on the promise of the master to remove the danger, where it appears that the co-servant C., represented to be an "apt fellow," was to be tried for a couple of days, and if he did not make good another man was to be sent, and the sawyer merely objected to C. as incompetent, stating that it would save time and lumber to have another man; since the anticipated injury was not personal to the sawyer. *Primley v. Elbe Lumber & Shingle Co.*..... 687
16. **MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—UNLOADING CAR OF LUMBER.** A laborer, unloading a car of lumber under the direction

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- of another common laborer, is guilty of contributory negligence, precluding any recovery, where, after removing the side stakes at either end of the car, and being unable to remove the center stake, he chopped it off, and the lumber then slid from the car and fell upon him, although he had had no previous experience. *Jock v. Columbia & Puget Sound R. Co.*..... 437
17. MASTER AND SERVANT—YOUTHFUL EMPLOYEE—CONTRIBUTORY NEGLIGENCE. A boy about seventeen years of age, learning the position of call boy in and about freight yards, is guilty of contributory negligence, as a matter of law, in attempting to cross a string of freight cars in the yard when there was a safe way around them, knowing that switching was going on and that the cars were liable to be moved at any time, and he evidently realized the danger; and where for two years he had been working on his own account, and was a man in experience. *Ryan v. Northern Pac. R. Co.*..... 279
18. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. An experienced locomotive fireman, familiar with the locality, who was struck by a passing train on the main line, while he was cleaning out his engine on a side track, is guilty of contributory negligence, as a matter of law, notwithstanding he had received no notice of meeting a train, where, before commencing work, he could have seen the train on the main line had he looked, but went to work in a cloud of steam where he was prevented from seeing or hearing the approaching train, and so close to the main line that he knew he would be struck by any passing engine. *Raines v. Great Northern R. Co.* 570
19. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY. The question of the contributory negligence of a servant, acting in an emergency, is for the jury, although when viewed retrospectively, several ways are discernible by which he might have escaped injury if he had had sufficient presence of mind. *Olson v. Erickson* 458
20. SAME—VICE PRINCIPALS—EVIDENCE OF COMPETENCY—MATERIALITY. Where plaintiff was injured through the negligence of a vice principal in performing a nondelegable duty, evidence as to general competency is properly excluded as immaterial. *Westerlund v. Rothschild* 626
21. MASTER AND SERVANT—INJURIES—SAFE APPLIANCES—EVIDENCE—PRIMA FACIE CASE—RES IPSA LOQUITUR. That a scaffold, furnished by a master for a servant to work on, broke when properly used for that purpose, is sufficient to make out a *prima facie* case of negligence on the part of the master, as the doctrine of *res ipsa loquitur* applies. *Cleary v. General Contracting Co.*..... 254
22. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action by an employee for injuries sustained in the fall of lumber through the alleged negligence of another servant in removing a

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prop, there is not sufficient evidence of the negligent act to warrant a verdict for the plaintiff, where no one saw the prop removed, the plaintiff merely testifying that the prop was in place when he started to work, and after the accident, and that, at a time while suffering intensely, he saw it on a near-by pile of lumber; and the removal of the prop was denied and no attempt was made to identify it. *Jock v. Columbia & Puget Sound R. Co.*..... 437

23. SAME—DUTIES OF SERVANT—EVIDENCE—SUFFICIENCY. In an action for injuries sustained by an employee while cleaning out a conveyor from a rip saw, there is sufficient evidence that he was engaged in the line of his duties, and that there was necessity to remove a lodged stick, where it appears that he had been told to keep the conveyor clean and the inference from the testimony was that he had received these instructions from the foreman. *Mercereau v. Maughlin Mill Co.*..... 475

24. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A tallyman, marking lumber near the rolls as it came from the head saw, who was injured when a log from the saw struck a cant that was being returned from a cut-off saw to be transferred to another section of rolls, is guilty of contributory negligence, where it appears that he was facing the log and saw it thirty seconds before it would strike the cant, that he took hold of the cant to throw it on to the other set of rolls, needlessly assuming the risk of removing the cant in reliance upon his ability to do so in time, when he had several avenues of escape and ample time to get out of the way. *Larsen v. Covington Lumber Co.*..... 146

25. MASTER AND SERVANT—NEGLIGENCE OF MASTER—SIGNALS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of a mill company in starting up the mill without giving the customary signal, and the contributory negligence of the operator of a rip saw, a boy seventeen years of age, in not throwing the saw out of gear by means of an idler, are questions for the jury, where it appears that a signal was given to stop the mill, and upon its stopping completely, the plaintiff undertook to remove a stick lodged in the conveyor, and that the mill suddenly started up whereby plaintiff's hand was cut and mangled, and that it was customary to give two blasts of the whistle before starting up the machinery. *Mercereau v. Maughlin Mill Co.*..... 475

26. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—CUSTOM—QUESTION FOR JURY. An employee who had worked in a mill but seven days does not assume the risks and is not guilty of contributory negligence, as a matter of law, in leaving the mill after work by going over the roller bed in accordance with the custom of the workmen, where there was no safe way especially provided and he was following the head sawyer,

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who was familiar with the mill, and his injury was due to the raising of a jump saw, without notice or warning, by an employee who was about to file the saw. *Jackson v. Danaher Lumber Co.*.... 596

27. **MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** In an action by an offbearer from a band saw, who was injured after placing a slab on the live rolls, by reason of the head block of the saw carriage striking the same when it was "gigged back," the questions as to the negligence of the master in furnishing a safe place, of the sawyer in not observing the position of the slab, and the assumption of risks and contributory negligence of the plaintiff in not truly placing the slab on the rolls, are for the jury, where it appears that the log being sawed was a short one held by the rear and middle blocks, making the operation more dangerous than usual, that the plaintiff was required to perform other duties, and after placing the slab, as he supposed correctly, was injured while attempting to remove a splinter from the saw as the log was rapidly moving back, and where plaintiff had worked in that position but three days. *St. John v. Cascade Lumber & Shingle Co.*..... 193
28. **SAME—An instruction as to 'the involuntary contact of an employee with a saw is not erroneous as failing to define "involuntary."** *Gage v. Springston Lumber Co.*..... 108

MEASURE OF DAMAGES:

For breach of warranty, see **SALES**, 5.
For failure of title of vendor, see **VENDOR AND PURCHASER**, 19, 20.
For negligence of bailee in storage of beef, see **WAREHOUSEMEN**, 3.

MECHANICS' LIENS:

- Making bill of particulars more specific by showing names of persons who labored on building, see **PLEADING**, 3.
Liens for labor and supplies on railroad, see **RAILROADS**, 3, 4.
Title and proviso as extending act providing for liens for labor and supplies furnished, see **STATUTES**, 1.
1. **MECHANICS' LIENS—NOTICE—NONLIENABLE ITEMS—EFFECT.** Including in a lien notice in good faith an item of \$18 paid for water connections incident to the plumbing work, does not render the lien void as to other items, even if that item was nonlienable. *Bellingham v. Linck*..... 208

MEETINGS:

Of stockholders, see **CORPORATIONS**, 1.

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Redemption of land from tax sale, see **TAXATION**, 8, 9.

MISCONDUCT:

Of attorney, ground for disbarment, see **ATTORNEY AND CLIENT**.

Of jurors, see **TRIAL**, 6.

MISTAKE:

As to boundaries of land in execution of deed, see **DEEDS**, 2.

Omitting charges in duplication of lost order for lumber, see **SALES**, 8.

MODIFICATION:

Of judgment by appellate court, see **APPEAL AND ERROR**, 36.

MONEY:

Larceny, see **LARCENY**, 2.

MONEY RECEIVED:

Recovery of price paid for goods, see **SALES**, 3.

Recovery of price paid for land, see **VENDOR AND PURCHASER**, 15, 16, 19, 20.

MORTGAGES:

Of personal property, see **CHATTEL MORTGAGES**.

Defect in title to defeat contract of sale of land, see **VENDOR AND PURCHASER**, 10.

1. **MORTGAGES—DEFAULT IN INSTALLMENTS—MATURITY.** A provision in a mortgage that on failure to pay any of the notes when due, the whole sum shall become due, does not mature the whole debt. *Spencer v. Alki Point Transportation Co.*..... 77

MOTIONS:

Judgment on motion as a bar, see **JUDGMENT**, 7.

To open or vacate judgment, see **JUDGMENT**, 2.

MUNICIPAL CORPORATIONS:

Exercise of power of eminent domain, see **EMINENT DOMAIN**, 3, 13.

Delegation to city of power to control sale of intoxicating liquors, see **INTOXICATING LIQUORS**.

Exclusiveness of Federal over municipal franchise to telegraph company, see **TAXATION**, 13.

MUNICIPAL CORPORATIONS—CONTINUED.

1. MUNICIPAL CORPORATIONS—CHARTERS—ADOPTION—INITIATIVE AND REFERENDUM. Under Const., art. 11, § 10, authorizing a city of 20,000 inhabitants to frame a charter for its own government, consistent with and subject to the laws of the state, a city may, subject to such limitation, adopt the initiative and referendum plan of government. *Hartig v. Seattle*..... 432
2. SAME—ADOPTION OF CHARTER—IMPLIED REPEAL OF STATUTES. Bal. Code, § 740, vesting the legislative power of cities in a mayor and council, does not prevent the adoption of a charter providing for the initiative and referendum form of government, because it would be impliedly repealed thereby. *Hartig v. Seattle*..... 432
3. SAME—VALIDITY—STATUTES. The initiative and referendum plan of government adopted pursuant to Const., art. 11, § 10, authorizing a city to frame its own charter, is not inconsistent with Bal. Code, § 740, vesting the legislative power of cities in a mayor and council; since such section applies only to powers provided for in the charter. *Hartig v. Seattle*..... 432
4. MUNICIPAL CORPORATIONS—ORDINANCES—ADOPTION—AMENDMENT—FRANCHISES. Under Bal. Code, § 1010, prohibiting the passage of an ordinance granting any franchise within five days after its introduction, an amendment of a franchise ordinance on the day of its passage by the substitution of the name of a railroad company, its successors and assigns, as grantee, in place of a mill company, its successors and assigns, is not such a change in the subject-matter of the ordinance as to render it a new or different ordinance, the purpose of the franchise being to permit the hauling of cars from the mill to the railroad, and being for the joint benefit of both companies. *State ex rel. Northern Pac. R. Co. v. Hughes*..... 651
5. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—BASIS—BENEFITS. A municipal assessment for sewer purposes is to be based upon benefits received, under Laws 1907, chapter 70, and not upon the last general assessment for city purposes, under Laws 1903, ch. 27, which is superseded. *Stewart v. Chehalis*..... 213
6. SAME—ASSESSMENTS FOR BENEFITS—VALIDITY—FINDING—SUFFICIENCY. A finding that a sewer was constructed almost solely for the benefit of a hospital "and was not intended or expected to benefit, nor did it prove of any benefit to the said premises of the plaintiff up to the time of the trial," is insufficient to defeat the assessment on the ground that it was not made according to benefits to the property. *Stewart v. Chehalis*..... 213
7. SAME—HEARING—ADJOURNMENTS—STATUTES—APPLICATION. The hearing on an assessment for sewers, levied under the act of March 27, 1890 (Laws 1890, p. 131, Bal. Code, § 943), may be continued for more than four weeks; since Bal. Code, § 1096, prohibiting continu-

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- ance for such length of time applies only to the act of March 10, 1891 (Laws 1891, p. 406), relating to drainage by cities of the second, third, and fourth classes. *Stewart v. Chehalis*..... 213
8. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT ASSESSMENTS—REASSESSMENTS—EFFECT OF JUDGMENTS. A judgment holding an assessment for a local improvement valid as to certain tracts and invalid as to other tracts, does not prevent a reassessment of the whole district. *Johnson v. Seattle*..... 564
9. SAME—ADDITIONAL COSTS AND INTEREST. Upon a reassessment for local improvements, the city may include additional costs and accrued interest. *Johnson v. Seattle*..... 564
10. SAME—JUDGMENTS—RES JUDICATA. Judgments in actions declaring the validity or invalidity of local improvement assessments are not *res judicata* in another action upon a reassessment. *Johnson v. Seattle* 564
11. MUNICIPAL CORPORATIONS—STREETS—EXTENDING OVER TIDE LANDS OUTSIDE CITY. Where, pursuant to Const., art. 15, § 1, harbor lines are established in front of a city the corporate limits of which only extend to the line of ordinary high tide, the city has power to extend its streets over intervening tide lands to and across the reserved area, as expressly authorized by Const., art. 15, § 3. *Tacoma v. Titlow* 217
12. MUNICIPAL CORPORATIONS—STREETS—SIDEWALK WITHOUT RAILING—INSTRUCTIONS. In an action against a city for injuries sustained in a fall in the street on a night which plaintiff had said was "so dark she could not see where she was going," it is not error to refuse an instruction based on that expression and making plaintiff guilty of contributory negligence as a matter of law if she voluntarily went into a dangerous place under such conditions, where there was other evidence as to the intensity of the darkness making that a question for the jury. *Stock v. Tacoma*..... 226
13. SAME—CONTRIBUTORY NEGLIGENCE—KNOWN DANGER. Where the city maintains a walk along a bulkhead without guard rail or light, a pedestrian familiar with the conditions is not guilty of contributory negligence as a matter of law in walking thereon upon a dark night when she might have avoided the danger by taking a safer way. *Stock v. Tacoma*..... 226
14. SAME—DAMAGES—PLEADING—ISSUES—SURPRISE AND DENIAL OF CONTINUANCE. Where the personal injuries alleged are the dislocation of a hip joint, paralysis of the right leg, bruises over the lower portion of the abdomen and severe shock to the nervous system, it is error to admit evidence of excessive menstruation, and to deny a continuance upon objection by the defense and claim of surprise. *Horton v. Seattle*..... 316

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15. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—EVIDENCE—ORDINANCES—ADMISSIBILITY. In an action against a city for personal injuries sustained in a fall through a hole in the street, it is proper to admit portions of city ordinances showing that the place was a public street; but it is error to allow portions thereof to be read showing that railroad companies had agreed to keep the same in repair and were liable over to the city, where the companies were not parties to the action. *Horton v. Seattle*..... 316
16. MUNICIPAL CORPORATIONS—STREETS—CONDEMNATION OUTSIDE CITY—APPEAL—QUESTIONS PRESENTED—PAYMENT OF AWARD. Upon appeal from an order adjudging a public necessity for condemnation for a street extension outside of the city, the question of the power of the city to levy assessments on lands outside its limits to pay the award does not arise, as the award must be paid before the land is taken. *Tacoma v. Titlow*..... 217
17. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—REFUNDS—LIMITATIONS. Seattle Charter, art. 8, § 17, requiring demand for refunds on excess payments to be made within two years from the date an assessment is due, is valid as a statute of limitation. *State ex rel. McCullough v. Seattle*..... 655
18. SAME—COMMENCEMENT OF PERIOD—WHEN "DUE." Seattle Charter, art. 8, § 17, requiring demand for refunds in excess payments to be made within two years from the date an assessment is "due" has reference to the date when an assessment may be paid and the lien discharged without added interest, although the assessment is payable in installments and not delinquent until a later period. *State ex rel. McCullough v. Seattle*..... 655
19. SAME—POSTPONEMENT OF LIMITATION. Failure to complete an assessment and ascertain whether there would be an excess at the time the assessment is due would not postpone the commencement of the limitation for making a demand for a refund to a time later, in any event, than the completion of the improvement. *State ex rel. McCullough v. Seattle*..... 655
20. SAME—ACTION TO RECOVER REFUND—LIMITATIONS. Under Bal. Code, §§ 4800, 4805, an action against a city to recover a refund on an excessive assessment must be commenced within at least three years after demand. *State ex rel. McCullough v. Seattle*..... 655
21. SAME—LIMITATION OF ACTIONS—TRUSTS. There is no trust relation existing between a city and property owners, by reason of the city's collection of excess assessments, that would prevent the running of the statute of limitations upon rights of action by the property owners to recover a refund given them by statute; since the statute runs where the beneficiary has notice and a right of action at law. *State ex rel. McCullough v. Seattle*..... 655

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22. **SAME—CLAIM BY MARRIED WOMAN—HUSBAND AND WIFE.** A claim against a city for personal injuries to a married woman need not be signed by the husband. *Horton v. Seattle*..... 316
23. **MUNICIPAL CORPORATIONS—CLAIMS—DESCRIPTION OF INJURY.** Where a claim against a city for personal injuries makes no mention of injury to her eyesight, although alleged in the complaint, plaintiff cannot recover therefor, when the claim was filed 21 days after the injury and she testifies that she knew her eyesight was injured within five days after the accident. *Horton v. Seattle*..... 316
24. **MUNICIPAL CORPORATIONS—CLAIMS—DESCRIPTION OF DEFECT—SUFFICIENCY.** A claim for damages sufficiently locates and describes the defect, where it describes a hole in a certain street "lying in front of the new ferry slip," and that plaintiff fell into a hole as she went from the ferry slip to said street; since the hole previously described is evidently intended. *Horton v. Seattle*..... 316

NAMES:

Materiality on cross-examination of name of person convicted as participant in crime, see **WITNESSES**.

NECESSITY:

Conclusiveness of decision as to necessity for condemnation for streets, see **EMINENT DOMAIN**, 3.

NEGLIGENCE:

Limitation of liability of carrier for negligence, see **CARRIERS**, 3-5.

Of carrier as to passenger, see **CARRIERS**, 6-10.

Of passenger, see **CARRIERS**, 10.

Defects or obstructions in highways, see **HIGHWAYS**.

Liability for loss of property of guest, see **INNKEEPERS**.

Of employers, see **MASTER AND SERVANT**.

Risks assumed by servant, see **MASTER AND SERVANT**, 14-19, 24-27.

Liability of cities for torts, see **MUNICIPAL CORPORATIONS**, 12-15.

Of person injured by defects or obstructions in street, see **MUNICIPAL CORPORATIONS**, 13.

Of purchaser in furnishing duplicate order for lumber, see **SALES**, 7, 8.

Of warehousemen, see **WAREHOUSEMEN**, 2, 3.

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.

Bills of lading, see **CARRIERS**, 1, 2.

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Service of process by publication to authorize entry of default judgment, see **PROCESS**.

NEW TRIAL:

Proceedings in lower court after remand, see **APPEAL AND ERROR**, 37-41.

Decision on appeal as law of the case on new trial, see **APPEAL AND ERROR**, 34, 35.

Presence of depositions in jury room as ground for, see **TRIAL**, 6.

1. **NEW TRIAL—NOTICE OF HEARING—NECESSITY.** The statute does not require formal three days' notice of the hearing of a motion for a new trial to be served upon the party making the motion. *State Bank of Washington v. Spokane-Columbia River R. & Navigation Co.* 528

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Defenses to bill or note, see **BILLS AND NOTES**, 3.

Affecting priority of lien of chattel mortgage, see **CHATTEL MORTGAGES**, 3.

Of stockholders' meeting, see **CORPORATIONS**, 1.

To quit possession of premises, see **FORCIBLE ENTRY AND DETAINER**, 2.
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Defects or danger as element of assumption of risk by servant, see **MASTER AND SERVANT**, 14, 15, 17, 18, 24, 26.

Of lien claims, see **MECHANICS' LIENS**.

Knowledge of defects in street by person injured, see **MUNICIPAL CORPORATIONS**, 13.

Claim for injury from defects or obstructions in street, see **MUNICIPAL CORPORATIONS**, 22-24.

Of hearing of motion for new trial, see **NEW TRIAL**.

Sufficiency of description in conditional bill of sale, see **SALES**, 6.

Affecting *bona fides* of purchaser of land, see **VENDOR AND PURCHASER**, 14.

OBJECTIONS:

Review as dependent on objection or exception made on trial, see **APPEAL AND ERROR**, 6.

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OCCUPATION:

Sufficiency of occupation to constitute adverse possession, see **ADVERSE POSSESSION**, 2.

Denial of liberty to choose occupation, see **CONSTITUTIONAL LAW**, 2.

OFFICERS:

Corporate officers, see **CORPORATIONS**, 6, 7.

Purchase of property at tax sale, see **TAXATION**, 4.

1. **OFFICERS—COUNTIES—TREASURER—TERM OF OFFICE—VACANCY.** Under Bal. Code, § 425 providing for the election of a county treasurer "who shall hold office for the term of two years, and until his successor is elected and qualified," and Bal. Code, § 1548, providing that every office shall become vacant upon the incumbent's refusal or neglect to take his oath of office or give or renew his official bond, no vacancy occurs authorizing an appointment by the county commissioners, upon the refusal of an officer-elect to qualify, since he was not an "incumbent"; and the term of his predecessor continues until a successor, "elected" by the same electoral body which elected the incumbent, has qualified. *State ex rel. Vanderveer v. Gormley* 543
2. **SAME—TERMS—HOLDING OVER—SUCCESSIVE TERMS.** Const., art. 8, § 6, providing for the biennial election of county officers, and art. 11, § 5, providing that no county officer shall hold office for more than two terms in succession, does not prevent the legislature from making the term of office two years and "until his successor is elected and qualified"; nor does it prevent a second term incumbent from holding over for two years more, on the refusal of his successor to qualify. *State ex rel. Vanderveer v. Gormley*..... 543

OPERATION:

Duty to operate through trains from terminus to terminus, see **RAILROADS**, 5, 6.

OPTION:

To waive or plead election of remedies, see **ELECTION OF REMEDIES**, 2.

ORAL CONTRACTS:

See **FRAUDS**, **STATUTE OF**.

ORAL EVIDENCE:

See **EVIDENCE**, 1-5.

ORDER OF PROOF:

In civil actions, see **TRIAL**, 1.

ORDERS:

Review of appealable orders, see **APPEAL AND ERROR**, 1, 2.

ORDINANCES:

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 4.

ORGANIZATION:

Increasing number of judges and provision for separate departments of supreme court, see **COURTS**.

ORIGINAL PROMISE:

To answer for debt, default or miscarriage of another, see **FRAUDS**, **STATUTE OF**, 1.

PARENT AND CHILD:

Custody and support of children on divorce, see **DIVORCE**, 4, 6.
Disability of infants and protection of property and rights of infants, see **INFANTS**.

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see **FRAUDS**, **STATUTE OF**.

PAROL EVIDENCE:

See **EVIDENCE**, 1-5.
To show consideration and nature of liability, see **BILLS AND NOTES**, 5, 7.
To prove custom on sale of lumber, see **SALES**, 1, 2.

PARTIES:

Persons entitled to appeal, see **APPEAL AND ERROR**, 4, 5.
Entitled to allege error, see **APPEAL AND ERROR**, 18, 19.
Review on certiorari of right to condemn for public use, see **EMINENT DOMAIN**, 12.
Persons affected by estoppel, see **ESTOPPEL**.
Husband or wife, see **HUSBAND AND WIFE**, 2.
Persons concluded by judgment, see **JUDGMENT**, 8.
In actions by or against partnership, see **PARTNERSHIP**.
Entitled to question sufficiency of tender, see **TENDER**.

1. **PARTIES—REPRESENTATIONS—SHERIFFS—COSTS.** In an action to restrain a sheriff and creditor from making an execution sale of property, the sheriff is the real and not a nominal party in the trespass, and personally liable for the costs of suit. *Bender v. Ragan* 521

PARTNERSHIP:

1. **PARTNERSHIP — PARTIES PLAINTIFF — CONTRACTS.** A contract of partnership between plaintiff and a third person is inadmissible to show a defect of parties plaintiff, or a necessity for filing the names of the partners under Laws 1907, p. 288, where the contract was dated after the plaintiff's cause of action arose against the defendants. *Ryder-Gougar Co. v. Garretson*..... 71

PAYMENT:

See **COMPROMISE AND SETTLEMENT.**

Of taxes to sustain adverse possession, see **ADVERSE POSSESSION**, 1, 3.

Compensation for property taken for public use, see **EMINENT DOMAIN**, 4-6, 13.

As affecting release of surety on contractor's bond, see **INDEMNITY**, 4.

Sufficiency of payment of premium to prevent forfeiture of insurance, see **INSURANCE**, 11.

Recovery of price paid for goods, see **SALES**, 3.

Taxes, see **TAXATION**, 7, 10.

Of charges for storage of goods, see **WAREHOUSEMEN**, 4.

PERFORMANCE:

Affecting operation of statute of frauds, see **FRAUDS, STATUTE OF**, 3.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 7, 11, 12, 15.

PERJURY:

As ground for disbarment of attorney, see **ATTORNEY AND CLIENT**, 1.

PERSONAL INJURIES:

To passenger, see **CARRIERS**, 6-10.

Recovery of expense for hospital services and medical attendance, see **DAMAGES**.

To traveler on highway, see **HIGHWAYS**.

Action for injury to married woman, see **HUSBAND AND WIFE**, 2.

To employee, see **MASTER AND SERVANT**.

From defects or obstructions in street or public place, see **MUNICIPAL CORPORATIONS**, 12-15.

PETITION:

Certainty in description of waters sought to be condemned, see **EMINENT DOMAIN**, 10, 11.

PLEA:

In criminal prosecutions, see **CRIMINAL LAW**, 1.

PLEADING:

Review of rulings as dependent upon presentation of question in lower court, see **APPEAL AND ERROR**, 6.

Review of rulings involving discretion of court, see **APPEAL AND ERROR**, 24.

Presumption as to amendment, see **APPEAL AND ERROR**, 21-23.

Amendment on appeal, see **APPEAL AND ERROR**, 20-24.

Actions between shareholders and officers or agents of corporation, see **CORPORATIONS**, 3.

Pleas in criminal prosecution, see **CRIMINAL LAW**, 1.

Necessity of pleading general custom, see **CUSTOMS AND USAGES**, 1.

To show election of remedies by former action, see **ELECTION OF REMEDIES**, 3.

On insurance policies, see **INSURANCE**, 11, 12.

For injuries from defects or obstructions in streets, see **MUNICIPAL CORPORATIONS**, 14.

In action to foreclose lien against railroad for equipment furnished in constructing road, see **RAILROADS**, 4.

For breach of warranty in sale, see **SALES**.

In action to foreclose tax lien, see **TAXATION**, 5.

Necessity of pleading usury as defense, see **USURY**, 1.

1. **PLEADING—INTERVENTION—TIME FOR FILING COMPLAINT.** Under Bal. Code, § 4846, a complaint in intervention is too late if not filed until after judgment. *Seattle & Northern R. Co. v. Bowman*... 416
2. **PLEADING—AMENDMENTS AT TRIAL—SURPRISE.** Error cannot be assigned upon a trial amendment to the complaint where no claim of surprise or request for a continuance was made. *Ryder-Gougar Co. v. Garretson*..... 71
3. **PLEADING—BILL OF PARTICULARS — MAKING MORE SPECIFIC — MECHANICS' LIENS.** It is not an abuse of discretion to deny a motion to make a bill of particulars more specific in an action to foreclose a mechanics' lien, by setting out the names of all persons who labored on the building, in order that defendant may secure their evidence. *Bellingham v. Linck*..... 208

PLEDGES:

See **CHATTEL MORTGAGES**.

Life insurance policy as security for loan, see **INSURANCE**, 6, 7.

POLICY:

Of insurance, see **INSURANCE**.

POSSESSION:

See **ADVERSE POSSESSION**.

Presumptions from possession of animals stolen from range, see **LARCENY**, 3.

Offer of possession by vendee in action to rescind contract, see **VENDOR AND PURCHASER**, 6.

POWERS:

Corporate powers, see CORPORATIONS, 4.

PRACTICE:

See APPEAL AND ERROR; APPEARANCE; COSTS; CRIMINAL LAW; JURY;
NEW TRIAL; PLEADING; PROHIBITION; TRIAL.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 29-33.

Ground for reversal in criminal prosecution, see CRIMINAL LAW, 7.

As affecting right to claim estoppel, see ESTOPPEL.

PREMIUMS:

Receipt of as estoppel to deny authority to issue certificate, see
INSURANCE, 2.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 21-23.

Indorsement of note as surety, see BILLS AND NOTES, 1.

Negligence in starting cable car, see CARRIERS, 8, 9.

To overthrow record title in ejectment, see EJECTMENT, 1.

Possession of animals taken from range, see LARCENY, 3.

As to validity of marriage, see MARRIAGE.

Of negligence in storage of beef, see WAREHOUSEMEN, 2.

PRICE:

Proof of custom in fixing price on sale of lumber, see SALES, 1.

PRINCIPAL AND AGENT:

See BROKERS.

Representation of corporation by agent, see CORPORATIONS, 6, 7, 10, 11.

Insurance agents, see INSURANCE, 1, 5.

Service of process on agent of railroad, see RAILROADS, 1.

1. PRINCIPAL AND AGENT—PROOF OF AGENCY—TESTIMONY OF AGENT.
An agent is competent to testify to the fact of the agency, such proof not being within the rule that agency cannot be proved by declarations of the agent. *Bender v. Ragan*..... 521
2. PRINCIPAL AND AGENT—EXISTENCE OF RELATION—SECRET AGREEMENT—EVIDENCE—SUFFICIENCY. Findings that there was a secret agreement that one C. should act as agent for defendant company in buying fruit, are sustained where it appears that the company furnished C. with money which he deposited in his own name and personally checked out in payment for fruit purchased for the company, and that the general agent of the company, prior to the time in question, told the bank they would discontinue the practice, and left orders as to whom the money was to be disbursed and had a

PRINCIPAL AND AGENT—CONTINUED.

quiet arrangement with the bank to be notified if it was disbursed otherwise, but did not order C. to discontinue the practice. *Guggenheime & Co. v. Youell*..... 163

3. **PRINCIPAL AND AGENT—AUTHORITY.** Agency may be created by conduct; and upon the receipt of proof by letters and conversations, it is a question for the jury whether an agent acted within the real or apparent scope of his authority. *Campbell v. Order of Washington* 398

4. **PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—PURCHASER IN GOOD FAITH FROM AGENT—ESTOPPEL—SET-OFF AGAINST PRINCIPAL.** Where a dealer in fruit secretly employes as its agent to purchase fruit one who had for two years been engaged in the same business on his own account, furnishing such agent moneys therefor to be deposited in his own name and personally checked out, and permitted the agent to store the fruit purchased as the agent's property and exercise all acts of ownership over the same, when the custom of agents in that locality was to buy in the names of their principals, the principal is estopped from claiming the property or questioning the right of an innocent purchaser, after the agent had sold and delivered the fruit as his own property; especially in view of the laws of that state to the effect that one dealing with an agent without knowledge of, or reason to believe in, the agency, may set off against the principal any claim which he might set off against the agent. *Guggenheime & Co. v. Youell*..... 163

PRINCIPAL AND SURETY:

See **INDEMNITY**.

Liability of indorser as surety, see **BILLS AND NOTES**, 1, 7.

Liabilities of corporation on contract of suretyship, see **CORPORATIONS**, 4.

PRIORITIES:

Of mortgages, see **CHATTEL MORTGAGES**, 3, 4.

Delivery as affecting priority of deed over judgment, see **DEEDS**, 3.

Of right to condemn lands, see **EMINENT DOMAIN**, 9.

PROCESS:

Effect of appearance, see **APPEARANCE**, 1.

Foreign corporations, see **CORPORATIONS**, 10, 11.

Validity of foreign divorce obtained on substituted service, see **DIVORCE**, 7, 8.

Defects as grounds for collateral attack on judgment, see **JUDGMENT**, 5.

On railroad companies, see **RAILROADS**.

PROCESS—CONTINUED.

1. **PROCESS—SUMMONS BY PUBLICATION—SUFFICIENCY.** Under Laws 1897, p. 182, § 96, authorizing service of summons by publication directing the defendant to appear within sixty days after the date of the first publication, a summons requiring the defendant to appear within sixty days after the "service" of the summons is insufficient to confer jurisdiction to enter judgment by default. *Gould v. Knox* 248

PROHIBITION:

1. **PROHIBITION—TO COURTS—RESTRAINING PROSECUTION.** Prohibition does not lie to a police judge to prevent the trial of a criminal charge upon the grounds of error in refusing a change of venue and the unconstitutionality of the law sought to be enforced; as there is a plain, adequate, and speedy remedy by appeal or writ of review. *State ex rel. Lyon v. Police Court of Hoquiam*..... 361

PROPERTY:

- Adverse possession, see **ADVERSE POSSESSION.**
- Division of property on divorce, see **DIVORCE**, 3, 4.
- Taking for public use, see **EMINENT DOMAIN.**

PROVISOS:

- In statutes, see **STATUTES**, 1.

PUBLICATION:

- Service of process, see **PROCESS.**

PUBLIC IMPROVEMENTS:

- By cities, see **MUNICIPAL CORPORATIONS**, 5-11, 16-21.

PUBLIC LANDS:

- Extending streets over tide lands, see **EMINENT DOMAIN**, 3.
- Extension of streets over tide lands outside city, see **MUNICIPAL CORPORATIONS**, 11.

PUBLIC USE:

- Taking property for public use, see **EMINENT DOMAIN.**

QUESTION FOR JURY:

- Loss of stock through defect in stock pen, see **CARRIERS**, 5.
- Time of death of absent person, see **DEATH.**
- In action by servant for injuries, see **MASTER AND SERVANT**, 14, 19, 25-27.
- Acts of agent as within scope of authority, see **PRINCIPAL AND AGENT**, 3.
- Relation of parties on bailment of goods as question of law, see **WAREHOUSEMEN**, 1.

RAILROADS:

Carriage of goods and passengers, see **CARRIERS**.

Injuries to employees, see **MASTER AND SERVANT**, 4, 5, 9, 12, 16-18, 22.

Statute limiting hours of labor of employees of common carriers, see **STATUTES**, 2.

1. **RAILROADS—SERVICE OF PROCESS—AGENTS.** The fact that a soliciting agent was advertised as the "General Agent" of defendant railway company does not authorize the service of process upon him, under Bal. Code, § 4875, subd. 4, authorizing service upon any agent, where he derived no actual authority from the defendant, which had no interest in his office, and his reports were made to, and his salary was paid by, other companies. *Arrow Lumber and Shingle Co. v. Union Pac. R. Co.*..... 629
2. **RAILROADS—CROSSING OTHER ROADS—FUTURE CONTINGENCIES—EXPENSE—DETERMINATION.** Where, in proceedings by a railroad company to condemn the right to cross street railway tracks, the court determined that there was no present necessity for safety devices, it is improvident and error to order that the petitioner, or junior road, should pay the cost of safety appliances that might be required in the future by the city or any lawful authority. *Chicago, Milwaukee & St. Paul R. Co. v. Tacoma R. & Power Co.*..... 682
3. **RAILROADS—CONSTRUCTION — LIENS — STATUTES — CONSTRUCTION—PROVISOS.** As a proviso to an act is not a part of, but a restraint upon or exception to it, Laws 1893, p. 32, § 1, as amended by Laws 1905, p. 229, which gives a lien to every person "furnishing material to be used in the construction of a railroad" does not give a lien for provisions, groceries and camp equipment supplied to a subcontractor; although there is added a "proviso" to the act to the effect that the railroad company shall take from contractors a bond to pay all persons who supply provisions, or be liable to the extent of such debts. *Tsutakawa v. Kumamoto*..... 231
4. **RAILROADS — CONSTRUCTION — LIEN.** A complaint in an action against a railroad company and a contractor for equipment sold to the contractor and to foreclose a lien on the railroad, states a cause of action against the contractor, although demurrable as to the company because the statute gives no lien therefor. *Tsutakawa v. Kumamoto* 231
5. **RAILROADS—REGULATION—SERVICE—OPERATION OF THROUGH TRAINS—CHARTER—MANDAMUS.** The original charter of the Northern Pacific Railway Company, authorizing it to maintain and enjoy a "continuous railroad" between its terminals, does not require it to operate all its through passenger trains from terminus to terminus; but it maintains and enjoys a "continuous railroad" from terminus to terminus when it operates one passenger train daily each way directly between its terminals without change of cars or deviation, affording

RAILROADS—CONTINUED.

adequate service for all who desire to travel over its line; and mandamus will not issue to require it to do more. *State ex rel. Whitehouse v. Northern Pac. R. Co.*..... 370

6. *SAME*. It would be immaterial that its through trains were not run over the main line as originally laid out, where changes were made to reduce curves and grades, and the old line received an adequate local service. *State ex rel. Whitehouse v. Northern Pac. R. Co.* 370

RAPE:

1. **RAPE—EVIDENCE—CORROBORATION OF PROSECUTRIX—CONNECTING DEFENDANT.** In a prosecution for rape, proof that the parties were together under suspicious circumstances at another time two months previous to the time charged, is not such corroborating evidence as tends to convict the defendant of the offense charged, within Laws 1907, p. 396, where the prosecutrix denied that any improper relations were had at that time. *State v. McCool*..... 486
2. *SAME*. In a prosecution for rape, proof that the prosecuting witness became pregnant, is not such corroborating evidence as tends to convict the accused of the crime, within Laws 1907, p. 396. *State v. McCool* 486

RATIFICATION:

Of broker's acts as between principal and broker, see **BROKERS**, 1, 3.
Act of married women, see **HUSBAND AND WIFE**, 1.

REAL ESTATE AGENTS:

See **BROKERS**.

REAL PROPERTY:

Effect of statute of frauds on agreement relating to real property, see **FRAUDS, STATUTE OF**, 2, 3.
Conveyance, see **VENDOR AND PURCHASER**.

REASSESSMENT:

Of property for benefits from public improvements, see **MUNICIPAL CORPORATIONS**, 8-10.

RECEIPTS:

Shipping receipts and bills of lading, see **CARRIERS**, 1, 2.

RECEIVERS:

Of corporations in general, see **CORPORATIONS**, 8, 9.

1. **RECEIVERS — OF INSOLVENT CORPORATIONS — AUTHORITY — STIPULATION—STOCKHOLDERS—RIGHT TO APPEAL.** Where the receiver and

RECEIVERS—CONTINUED.

several stockholders of a corporation intervened in an action against the corporation, a stipulation of the receiver in the nature of a compromise, authorized by the court, binds the stockholders, as the receiver represents the stockholders as well as the corporation; and an appeal by the stockholders will not be considered. *Spencer v. Alki Point Transportation Co.*..... 77

RECITALS:

Conclusiveness of recitals in judgment, see JUDGMENT, 6, 7.

RECORDS:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 10, 11.
 Chattel mortgage, see CHATTEL MORTGAGES, 1, 2.
 Priority of record of chattel mortgages, see CHATTEL MORTGAGES, 3, 4.
 Sufficiency of prior recorded deed as defense to ejectment, see EJECTMENT, 1.
 Effect of failure to record judgment of divorce, see JUDGMENT, 1.
 As notice affecting *bona fides* of purchase of land, see VENDOR AND PURCHASER, 14.

REDEMPTION:

From tax sale, see TAXATION, 8-11.

REFORMATION OF INSTRUMENTS:

Reformation of void contract, see FRAUDS, STATUTE OF, 6.

REFUND:

Of commissions by agents on cancellation of policy, see INSURANCE, 5.
 Of excessive assessment for improvements, see MUNICIPAL CORPORATIONS, 17-21.

REGULATION:

Mandamus to require operation of through trains from terminus to terminus, see RAILROADS, 5, 6.

REHEARING:

Right to rehearing by court *en banc*, see COURTS.

RELEASE:

Of surety, see INDEMNITY.

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 37-41.

REMISSION:

Of excess of judgment, see APPEAL AND ERROR, 36.

RENT:

Liability of vendees for rents prior to rescission of contract, see **VENDOR AND PURCHASER**, 8.

RE-OPENING CASE:

For further evidence, see **TRIAL**, 2.

REPEAL:

Implied repeal of law delegating power to mayor and council to control sale of liquors, see **INTOXICATING LIQUORS**.

Implied repeal of statute vesting legislative power in mayor and city council, see **MUNICIPAL CORPORATIONS**, 1-3.

REPLEVIN:

Of goods held for storage charges, see **WAREHOUSEMEN**, 4.

REPRESENTATIONS:

Representation of corporations by officers or agents, see **CORPORATIONS**, 6, 7, 10, 11.

REPUDIATION:

Of deed by minor, see **INFANTS**.

REQUESTS:

For instructions in civil actions, see **TRIAL**, 4.

RESCISSION:

Of contract for breach of warranty, see **SALES**, 5.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 2, 4-7, 15.

RES IPSA LOQUITUR:

See **CARRIERS**, 8, 9; **MASTER AND SERVANT**, 21.

RES JUDICATA:

See **JUDGMENT**, 2, 6-9.

Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 34, 35.

Judgment of dismissal as bar to another action, see **DIVORCE**, 1, 2.

Conclusiveness of judgment in proceedings to assess property for local improvement, see **MUNICIPAL CORPORATIONS**, 10.

RESTITUTION:

Erroneous issuance of writ as invalidating judgment, see **FORCIBLE ENTRY AND DETAINER**, 1.

RESTRAINING ORDER:

See **INJUNCTION**.

REVENUE:

See **TAXATION**.

REVIEW:

By higher court on appeal for errors or irregularities, see **APPEAL AND ERROR**.

In criminal prosecution, see **CRIMINAL LAW**, 5-7; **FORGERY**, 4.

Of condemnation proceedings, see **EMINENT DOMAIN**, 3, 10, 12.

RIGHT OF WAY:

Of railroads, see **RAILROADS**, 2.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 14-19, 24-27.

SAFE PLACE TO WORK:

See **MASTER AND SERVANT**, 2-4, 7, 27.

SALES:

By broker and compensation, see **BROKERS**.

Covenants of warranty on sale of personal property, see **COVENANTS**, 1.

Parol evidence to vary contract of sale, see **EVIDENCE**, 2.

Of intoxicating liquors, see **INTOXICATING LIQUORS**.

Liability of undisclosed principal of purchaser, see **PRINCIPAL AND AGENT**, 4.

Tax sales, see **TAXATION**, 4, 7-11.

Of real property, see **VENDOR AND PURCHASER**.

1. **SALES—CONTRACT—PRICE—PROOF OF CUSTOM.** On the sale of lumber at a mill in Washington, tally and inspection to be made at point of delivery in California, whether the price fixed was net at the mill or gross at the point of delivery, would, in the absence of specific agreement, depend upon custom that could be proved by parol. *Hughes Mfg. and Lumber Co. v. Parker-Bell Lumber Co.* 516
2. **SALES—CONTRACT—COMPLETION—LATENT DEFECTS—PROOF OF CUSTOM.** A contract for the sale of lumber, made by correspondence, cannot be objected to as incomplete in specific details of the specifications, where they were only latent defects which might be proved by parol, if the writings were ambiguous at all; and especially not where the specific points made are expressly covered by different letters. *Hughes Mfg. and Lumber Co. v. Parker-Bell Lumber Co.* 516
3. **SALES—ACTION FOR PRICE—DEFENSES—FRAUD—ESTOPPEL—CORPORATE STOCK.** The purchaser of corporate stock is not estopped, by his delay in offering to return it, from setting up fraud and want of consideration as a defense to an action for the price, where the

SALES—CONTINUED.

sale was made October 16, 1907, the fraud was discovered December 15, 1907, and the action was commenced February 3, 1908. *Archibald v. Hahn*..... 602

4. **SALES—BREACH OF WARRANTY—REMEDIES OF PURCHASER—DAMAGES RECOVERABLE—ELECTION.** Upon the breach of an implied warranty of a combined harvester, the purchaser may elect to rescind the sale and recover the purchase money paid, or he may retain the machine and offset against the purchase price the damages to his crops naturally resulting from the breach; but he cannot, in an action for the price, recover on counterclaim both the purchase money paid, as upon a rescission, and damages to his crops by reason of the breach of warranty, as the remedies are inconsistent. *Houser & Haines Mfg. Co. v. McKay*..... 337
5. **SAME—RESCISSION FOR BREACH OF WARRANTY—PLEADING—ISSUES—MEASURE OF DAMAGES.** In an action for the purchase price of a combined harvester in which the defendant set up a breach of warranty and claimed damages to his crop in attempting to use the machine, and it appears from evidence admitted without objection that the defendant rescinded the sale and refused to accept the machine, defendant's measure of damages is the sum paid on the purchase price; and he cannot recover for damages to his crop. *Houser & Haines Mfg. Co. v. McKay*..... 337
6. **SALES—CONDITIONAL SALES—SUFFICIENCY OF DESCRIPTION—EVIDENCE—ADMISSIBILITY.** In replevin for an engine held under a conditional bill of sale, upon an issue as to whether the bill of sale sufficiently described the engine to give constructive notice, it is error to receive evidence that there were similar engines in the county to which the description would apply; since the description need not be so particular as to exclude all other engines. *Wittler-Corbin Machinery Co. v. Martin*..... 65
7. **SALES—ORDERS—NEGLIGENCE IN FURNISHING DUPLICATES—LOSS BY ADVANCE IN PRICE.** Where orders for lumber were lost, and the purchaser undertook to furnish duplicate copies and negligently omitted several items, and after the orders were filled according to such duplicates, the price of lumber advanced, the purchaser must stand the loss on the omitted items because of its negligence; since the vendor might have protected itself before the advance. *Michigan Lumber Co. v. Waite Lumber Co.*..... 604
8. **SAME—MISTAKE IN DUPLICATE AS TO CHARGES—EFFECT.** In such a case, where the duplicate orders by mistake omitted a charge for freight to be borne by the vendor, the vendor must pay such charge according to the original sale, as there was no new contract nor any injury to the vendor by the mistake as to the freight. *Michigan Lumber Co. v. Waite Lumber Co.*..... 604

SCAFFOLDS:

Master's liability for injuries received from defective scaffold, see
MASTER AND SERVANT, 3, 21.

SEPARATE ESTATE:

Conveyance by husband of wife's separate estate and ratification by
wife, see HUSBAND AND WIFE, 1.

SERVANTS:

See MASTER AND SERVANT.

SET-OFF AND COUNTERCLAIM:

Set-off against principal of claim against agent, see PRINCIPAL AND
AGENT, 4.

In actions for price of goods sold, see SALES, 4.

SETTLEMENT:

See COMPROMISE AND SETTLEMENT.

SEWERS:

Construction of by municipality, see MUNICIPAL CORPORATIONS, 5-7.

SHERIFFS AND CONSTABLES:

Liability in action to restrain execution sale as party in interest,
see PARTIES.

SIGNATURES:

To bills or notes, see BILLS AND NOTES, 1, 7.

To memorandum taking transaction out of operation of statute of
frauds, see FRAUDS, STATUTE OF, 5.

SPECIFIC PERFORMANCE:

Of contract to purchase land, see VENDOR AND PURCHASER, 11.

SQUATTERS:

See ADVERSE POSSESSION, 2.

STALE DEMANDS:

See EQUITY.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 10, 11.

STATUTES:

See **FORCIBLE ENTRY AND DETAINER**, 2; **FRAUDS, STATUTE OF**.

Negotiability and rights under bill of lading, see **CARRIERS**, 1.

Contract presumed to be made in contemplation of law, see **CONTRACTS**.

Delegation of power of eminent domain, see **EMINENT DOMAIN**, 1, 2.
 Strict compliance with to avoid liability for loss of property of guest, see **INNKEEPERS**, 3.

Control of liquor traffic, see **INTOXICATING LIQUORS**.

Grant of legislative powers to city, see **MUNICIPAL CORPORATIONS**, 1-3.

Public improvements, see **MUNICIPAL CORPORATIONS**, 7, 11.

Assessments for benefits for street improvements, see **MUNICIPAL CORPORATIONS**, 5, 7.

Limitation of time to recover refund on excessive assessment, see **MUNICIPAL CORPORATIONS**, 20.

Relating to election or term of office, see **OFFICERS**.

Service by publication, see **PROCESS**.

Lien for labor or supplies furnished to railroad company, see **RAILROADS**, 3, 4.

Redemption by minor from tax sale, see **TAXATION**, 8, 9.

1. **STATUTES—TITLE OF ACT—PROVISO.** An act entitled an act providing for liens for labor performed, material, provisions, and supplies furnished, the body of which gives a lien for labor and materials only, does not give a lien for supplies, although a proviso makes the company liable for supplies in case a bond is not taken from contractors to secure the same, since the title and provisos to an act do not extend its effect. *Tsutakawa v. Kumamoto*..... 231
2. **STATUTES—TIME OF TAKING EFFECT—COMMERCE—LIMITING HOURS OF LABOR—CARRIERS—REGULATION.** Act Cong., March 4, 1907, making it unlawful for any common carrier to require employees to remain on duty for a longer period than sixteen consecutive hours, and providing that the act shall "take effect and be in force one year after its passage," did not take effect as a law until the end of such period; and it did not supersede, during such year, a prior state statute on the same subject (Laws '07, p. 25), upon any principle of comity, or upon the theory that Congress had occupied the field of statutory regulation and fixed a reasonable time to allow carriers to comply with the regulations. *State ex rel. Atkinson v. Northern Pac. R. Co.* 673

STIPULATIONS:

For maturity of mortgage debt in default, see **MORTGAGES**.

Of receiver in nature of compromise as binding on stockholders, see **RECEIVERS**.

STOCK:

Sale of corporate stock, see **SALES**, 3.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1-3.

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See WAREHOUSEMEN.

STREET RAILROADS:

Injuries to passengers, see CARRIERS, 6-10.

STREETS:

Condemnation for, see EMINENT DOMAIN, 3, 13.

Injury to traveler on county road, see HIGHWAYS.

Extending over tide lands outside city, see MUNICIPAL CORPORATIONS, 11.

Injuries from obstructions or defects in, see MUNICIPAL CORPORATIONS, 12-15.

SUICIDE:

Effect on policy, see INSURANCE, 8, 9.

SUMMONS:

See PROCESS.

SUPERSEDEAS:

On appeal or writ of error, see APPEAL AND ERROR, 3.

SURFACE WATERS:

See WATERS AND WATER COURSES.

SURRENDER:

Of insurance policy, see INSURANCE, 6.

SUSPENSION:

Of temporary restraining order, see INJUNCTION, 2.

TAXATION:

Payment of taxes to sustain adverse possession, see ADVERSE POSSESSION, 1, 3.

Time to appeal from judgment in action to set aside foreclosure sale and quiet title, see APPEAL AND ERROR, 9.

Amendment of pleading to show tender and proof of payment into court, see APPEAL AND ERROR, 23.

Judgment against property not in existence as harmless error, see APPEAL AND ERROR, 32.

Drainage taxes, see DRAINS.

TAXATION—CONTINUED.

Liquor licenses, see INTOXICATING LIQUORS.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 5-10, 16-21.

1. TAXATION—FEDERAL FRANCHISES—TELEGRAPH COMPANIES. The Federal franchise granted to telegraph companies by U. S. Rev. Statutes, § 5263, to maintain lines on and over the military or post roads of the United States, is not subject to an arbitrary franchise tax by the state. *Western Union Telegraph Co. v. Lakin*..... 326
2. SAME—TELEGRAPH COMPANIES—EXCLUSIVENESS OF FEDERAL FRANCHISE. The Federal franchise granted to telegraph companies by U. S. Rev. Statutes, § 5263, to maintain its lines on and over the military or post roads of the United States, confers the right to do business upon all the roads and highways in cities and counties, subject to police regulation, and is exclusive; hence a municipal franchise is valid only as a police regulation and is not subject to an arbitrary franchise tax. *Western Union Telegraph Co. v. Lakin* 326
3. SAME—VOID ASSESSMENT—OBJECTION—WAIVER. Failure of a telegraph company to list all its tangible property for taxation does not preclude it from resisting a tax on its Federal franchise. *Western Union Telegraph Co. v. Lakin*..... 326
4. TAXATION—TAX SALE—VALIDITY—PURCHASE BY OFFICER. A sale of land for taxes by a county treasurer to a deputy in his office is void as against public policy. *Coughlin v. Holmes*..... 692
5. TAXATION—FORECLOSURE—DEFENSES—ANSWER—ESTOPPEL. In an action to foreclose a tax lien, an answer pleading the existence of a certain lot precludes the claim that there was no such lot. *Sound Investment Co. v. Bellingham Bay Land Co.*..... 470
6. TAXATION—FORECLOSURE—COSTS—PERSONAL JUDGMENT. In a tax foreclosure suit, personal judgment should not be entered for costs. *Sound Investment Co. v. Bellingham Bay Land Co.*..... 470
7. TAXATION—FORECLOSURE AND SALE—DEFENSES—EFFORT TO PAY—MISTAKE OF OFFICER. Efforts of the owner in good faith to pay taxes before delinquency, which were prevented by mistake of the county treasurer in informing him that the taxes were paid, are equivalent to payment, rendering a tax sale therefor void. *Gleason v. Owens*. 483
8. TAXATION—SALE OF PROPERTY—REDEMPTION—BY "MINOR HEIRS"—STATUTES—CONSTRUCTION. Laws 1899, p. 298, permitting any "minor heirs" to have been advisedly used in order to limit the right to whom land had been deeded in trust and who had not inherited the property, as the statute is clear, and the history of the act shows "heirs" to have been advisedly used in order to limit the right to redeem to those who take by descent. *Burdick v. Kimball*..... 198

TAXATION—CONTINUED.

9. SAME—TITLE IN TRUSTEE—REDEMPTION BY MINOR CESTUI QUE TRUST. Where the full legal title to land is in a trustee for a minor, the minor cannot redeem the land from tax sale under Laws 1899, p. 298, his remedy being against the trustee. *Burdick v. Kimball*. 198
10. TAXATION—REDEMPTION—PAYMENT INTO COURT—JUDGMENT VACATING SALE. Failure to require repayment of a tax, in a judgment setting aside the tax sale, is immaterial where, prior to entry of the judgment, the amount had been paid into court. *Gleason v. Owens* 483
11. TAXATION—ACTION TO SET ASIDE TAX SALE—REDEMPTION—TENDER—WAIVER. Purchasers at a tax foreclosure, by asserting title and refusing to consider a tender of the taxes, waive the tender required by Bal. Code, § 5678, as a condition precedent to action to set aside the sale. *Gould v. Knox*..... 248

TELEGRAPHS AND TELEPHONES:

Taxation of Federal franchise granted telegraph company, see TAXATION, 1-3.

TENDER:

Of taxes due as condition precedent to attack on tax title, see TAXATION, 11.

Of conveyance by vendor of land, see VENDOR AND PURCHASER, 1, 7, 12.

1. TENDER—SUFFICIENCY. The sufficiency or formality of a tender cannot be questioned by one who refuses unconditionally to accept a tender. *Walsh v. Colvin*..... 309

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For filing briefs, see APPEAL AND ERROR, 12.

For recording chattel mortgages, see CHATTEL MORTGAGES, 2.

Presumption of death from lapse of time, see DEATH.

For application to vacate judgment, see JUDGMENT, 3, 4.

Of taking effect of statute, see STATUTES, 2.

Extension of time for payment as waiver of right to declare forfeiture of contract, see VENDOR AND PURCHASER, 2.

TITLE:

- Color of title, see ADVERSE POSSESSION.
- To maintain ejectment, see EJECTMENT.
- Of statutes, see STATUTES, 1.
- Sufficiency of title of vendor of land, see VENDOR AND PURCHASER, 5, 9, 10.
- Defect as ground for rescission of sale of land, see VENDOR AND PURCHASER, 4, 5, 8, 9, 15.

TORTS:

- See FORCIBLE ENTRY AND DETAINER.
- In carriage of passengers, see CARRIERS, 6-10.
- Injuries caused by defects or obstructions in road, see HIGHWAYS.
- Of cities, see MUNICIPAL CORPORATIONS, 12-15.
- Proper or necessary parties in actions for, see PARTIES.
- By warehousemen, see WAREHOUSEMEN.
- Obstruction and detention of natural water courses, see WATERS AND WATER COURSES.

TRESPASS:

- Liability of sheriff as party in interest in action to restrain execution sale, see PARTIES.

TRIAL:

- Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 6-8.
- Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 10, 11.
- Scope and extent of review as dependent on theory of case, see APPEAL AND ERROR, 13, 14.
- Scope and extent of review as dependent on mode of trial below, see APPEAL AND ERROR, 13, 14, 16.
- Review of rulings involving discretion of court, see APPEAL AND ERROR, 24.
- Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 29-33.
- Review of findings in trial by court, see APPEAL AND ERROR, 26-28.
- Disbarment proceedings, see ATTORNEY AND CLIENT, 2.
- In criminal prosecutions, see CRIMINAL LAW.
- Instruction allowing recovery for hospital services and medical attendance, see DAMAGES.
- Instructions as to maintenance of county road in safe condition, see HIGHWAYS.
- Instructions in action on insurance policies, see INSURANCE, 8, 9.
- Judgment of dismissal as *res adjudicata*, see JUDGMENT, 7.
- Summoning and impaneling jury, see JURY.
- Instructions in action for injuries to servant, see MASTER AND SERVANT, 1-3, 28.

TRIAL—CONTINUED.

Motions and grounds for new trial, see **NEW TRIAL**.

Amendment of pleading during trial, see **PLEADING**, 2.

Relation of parties on bailment of goods as question of law, see **WAREHOUSEMEN**, 1.

Attendance and examination of witnesses, see **WITNESSES**.

1. **TRIAL—APPEAL—DISCRETION—EVIDENCE—ORDER OF ADMISSION.** A case will not be reversed for allowing evidence in rebuttal that plaintiff might have introduced in chief, except on the plainest abuse of discretion, and where there was no refusal to allow evidence in reply thereto. *Bellingham v. Linck*..... 208
2. **TRIAL—CONDUCT OF CAUSE—REOPENING CASE FOR EVIDENCE—DISCRETION.** It is not an abuse of discretion to refuse to open a case for the further evidence of the president of the company who had just returned after an absence of two months, where such president was the attorney of the company at the time it intervened, and failed in his duty to advise the attorneys as to the materiality of his evidence. *Spencer v. Alki Point Transportation Co.*..... 77
3. **TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE.** Instructions do not violate Const. art. 4, § 16, prohibiting charges with respect to matters of fact and comment on the evidence, where they do no more than set forth the legal effect of a certain state of facts. *Cleary v. General Contracting Co.*..... 254
4. **TRIAL—INSTRUCTIONS.** It is not error to refuse a request for an instruction that is covered by another instruction. *Menasha Wooden Ware Co. v. Nelson*..... 160
5. **TRIAL—INSTRUCTIONS—CONSIDERED AS A WHOLE.** Error cannot be predicated on separate instructions where, considered as a whole, they properly state the law. *St. John v. Cascade Lumber & Shingle Co.* 193
6. **TRIAL—NEW TRIAL—CONDUCT OF JURY—DEPOSITIONS IN JURY ROOM—HARMLESS ERROR.** The inadvertent presence of depositions in the jury room, prohibited by Bal. Code, § 5004, is not prejudicial error as ground for a new trial, where the jury did not consult them or know of their presence. *Wintermute v. Standard Furniture Co.* 539

TRUSTS:

Existence of relation between city and property owner on payment of excessive assessment, see **MUNICIPAL CORPORATIONS**, 21.

Redemption from tax sale by minor *cestui que* trust, see **TAXATION**, 9.

1. **TRUSTS—ESTABLISHMENT—EVIDENCE.** An option to purchase timber on lands owned by the plaintiff, and other lands which plaintiff expected to buy, is not sufficient to make the defendant a trustee for the plaintiff as to other lands in the vicinity purchased of third persons, where plaintiff had nothing to do with such purchase and

TRUSTS—CONTINUED.

- did not aid therein or advance any of the purchase price, even if an officer of the defendant stated to an officer of the plaintiff, that, if the purchase was made, the lands should come within the option agreement. *Clallam Land & Investment Co. v. Jackson*..... 190
2. SAME—VALIDITY—CONSIDERATION. A naked promise to buy lands with one's own money and hold them for another is without consideration and cannot be enforced in equity. *Clallam Land & Investment Co. v. Jackson*..... 190
3. TRUSTS—TRUSTEE EX MALEFICIO—VERBAL PROMISE—EVIDENCE—SUFFICIENCY. A trust *ex maleficio* does not arise from a mere verbal promise by the purchaser of one of several lots to attend to the matter of acquiring the title to abutting tide lands for the benefit of the purchasers of other lots in the same block, made at the same time, where the parties were entire strangers, the promisor had no funds or property in his hands belonging to the others and none was furnished and he did not agree to advance any for the contemplated purchase, and he was not to receive any compensation for the volunteered service, and in acquiring a deed for himself, the grantors of the tide lands were not concerned as to what parties were to be benefited by the purchase; notwithstanding representations that the purchaser was acting for the benefit of himself and neighbors. *Cushing v. Heuston*..... 379
4. TRUSTS—IMPLIED TRUSTS—EVIDENCE—SUFFICIENCY. An implied trust upon the holder of a legal title to land should not be found on conflicting parol testimony, if there is left any ground of doubt in regard to it. *Cushing v. Heuston*..... 379

ULTRA VIRES:

Acts of corporation, see CORPORATIONS, 5.

UNDISCLOSED AGENCY:

See PRINCIPAL AND AGENT, 4.

UNLAWFUL DETAINER:

See FORCIBLE ENTRY AND DETAINER.

USURY:

1. USURY—PLEADING—DEFENSES. Usury to be available as a defense must be pleaded. *Fenby v. Hunt*..... 127
2. USURY—PERSONAL DEFENSE. The defense of usury is personal to the debtor and cannot be set up by a creditor to gain priority over other creditors. *Fenby v. Hunt*..... 127

VACANCIES:

Effect of refusal of successor to qualify for office, see OFFICERS.

VACATION:

- Of judgment or order after affirmance, see **APPEAL AND ERROR**, 41.
- Of judgment, see **JUDGMENT**, 2-5.
- Tax judgment, see **TAXATION**, 10, 11.

VALUE:

- Of land appropriated for public use as measure of compensation, see **EMINENT DOMAIN**, 6.

VARIANCE:

- Name of party defrauded, see **FORGERY**, 2.

VENDOR AND PURCHASER:

- Compensation of broker procuring conveyance, see **BROKERS**, 2, 6.
 - Covenants of warranty on sale of land, see **COVENANTS**, 2, 3.
 - Mistake as to boundaries of land in execution of deed, see **DEEDS**, 2.
 - Parol evidence to vary contract to purchase land, see **EVIDENCE**, 4.
 - Conclusiveness as against vendee of judgment against vendor, see **JUDGMENT**, 8.
 - Right of contract purchaser to prize offered by vendor of townsite lot, see **LOTTERIES**.
 - Transfers of ownership of personal property, see **SALES**.
 - Purchasers at tax sale, see **TAXATION**, 4.
 - Creation of trusts by conveyance or purchase of real property, see **TRUSTS**.
1. **VENDOR AND PURCHASER—MUTUAL COVENANTS—DEMAND.** The provisions of a land contract providing for a second payment at a specified time, and that deed should be given on such payment, are mutual and concurrent, and the vendor cannot declare a forfeiture without demand and tender of a deed. *Christy v. Baiocchi*. 644
 2. **SAME—CONTRACT—FORFEITURE—WAIVER—EXTENSION OF TIME.** Extending the time for and accepting payment, after defaulting on certain installments due on a land contract, does not waive the right to declare a forfeiture for default in paying future installments, time for which was not extended. *Cash v. Meisenheimer*. 576
 3. **VENDOR AND PURCHASER—CONTRACT—FORFEITURE—EXCUSE FOR DEFAULT.** An initial payment on a land contract is not forfeited by failure to make a second payment on the date set, when the vendors were out of the state at the time it was due. *Christy v. Baiocchi*. 644
 4. **SAME—RESCISSION BY VENDEE—DEFECTS IN TITLE.** The fact that the vendor did not have the legal title to land, which was held for him by a trustee, does not entitle the vendee to rescind, while in default on payments, where the vendee knew the state of the title at the time of the sale. *Cash v. Meisenheimer*. 576

VENDOR AND PURCHASER—CONTINUED.

5. **SAME—RESCISSION BY VENDEE.** A purchaser will not be allowed to rescind for defects in title, where it appears that he advertised and failed to resell the property at a profit, repented of his contract, obtained an attorney's opinion searching out all possible defects, and refused to return the abstract for correction or afford reasonable opportunity to remove the alleged defects. *Summy v. Ramsey*..... 93
6. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—ACTIONS—OFFER OF POSSESSION.** An action by a vendee to rescind a sale of land, does not fail because the plaintiffs did not offer to give up possession, where they tendered a quitclaim deed to the defendants and brought it into court. *Snarski v. Washington State Colonization Co.*..... 221
7. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—CONTRACT—FAILURE TO PERFORM—EVIDENCE—FAILURE OF PROOF.** In an action for damages on a vendee's rescission of a land contract, on failure of the owners to deliver a deed upon demand upon one defendant, there is a failure of proof as to default by another defendant having an interest in the land who tendered a deed within a reasonable time thereafter, where it appears that he had no previous knowledge of the sale, and his only connection with the matter was through an agency expressly limited to the execution of a contract without power to make deeds until certain conditions were performed. *Walsh v. Colvin*..... 309
8. **SAME—DAMAGES—RENTS PRIOR TO RESCISSION.** In an action to rescind a sale of land for failure of title, the vendees are not liable for rents for use of the premises while in possession, and the same cannot be deducted from their damages. *Snarski v. Washington State Colonization Co.* 221
9. **VENDOR AND PURCHASER—MARKETABLE TITLE.** A vendee contracting for an abstract showing a good title is entitled to a marketable title, *i. e.*, one free from reasonable doubt. *Summy v. Ramsey*.. 93
10. **SAME—MORTGAGES—MERGER.** An abstract shows a marketable title notwithstanding reference to an unreleased mortgage, where it appears from the abstract that the mortgage had been assigned to one R. who subsequently obtained the full title and conveyed with full covenants, there being at the time no other outstanding lien and no record of any assignment of the mortgage pursuant to Bal. Code, §§ 4565, 4566; since a merger of the mortgage was shown. *Summy v. Ramsey* 93
11. **VENDOR AND PURCHASER—PERFORMANCE—DEFECTS IN TITLE—SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY.** Where, upon a trade of property, each party agreed to furnish an abstract showing a good and sufficient title within thirty days, specific performance will not be decreed in favor of a plaintiff whose abstract of title was defective, where it appears from plaintiff's testimony that he acknowledged the defect, after one attempt to correct it, and that de-

VENDOR AND PURCHASER—CONTINUED.

- pendant, having waited for a reasonable length of time after the thirty days, then indicated that he would not be further bound by the contract. *Coonrod v. Studebaker*..... 32
12. VENDOR AND PURCHASER—PERFORMANCE—REASONABLE TIME FOR DELIVERY OF DEED. Where a tender of a balance due upon the purchase price of land was made April 1, entitling the purchaser to a deed, and the vendor was without title and had to acquire the same by paying \$3,500, but took no steps to do so until the matter was taken up by another, a tender of a deed on April 29th is not made within a reasonable time. *Walsh v. Colvin*..... 309
13. VENDOR AND PURCHASER—FORFEITURE OF CONTRACT—RIGHTS OF CREDITORS OF VENDEE—EXECUTION—PROPERTY SUBJECT TO LEVY. After due forfeiture of a contract to purchase lots for nonpayment of installments due, time being of the essence and title remaining in the vendor, a creditor of the vendee acquires no interest by the levy of execution and tender of the installments, there being no evidence of collusion between the vendor and vendee. *Johnson v. Sekor*... 205
14. VENDOR AND PURCHASER—BONA FIDE PURCHASER—RECORD—NOTICE. The record of a deed of lots 7 and 8 in an addition without specifying the block is sufficient to put a subsequent purchaser on notice, where the grantors only owned lots 7 and 8 in block 5 of the addition, and where an inquiry of the grantor or grantees would have disclosed that the grantees were claiming the lots under such deed. *Wetzler v. Nichols*..... 285
15. SAME—RESCISSION BY VENDEE—DAMAGES. Where a vendor, having no title, agreed to give a deed upon payment of the balance due, which is duly tendered, the vendor does not have a reasonable time within which to acquire title, but his contract is breached, and the vendee may rescind at once and recover the purchase money paid, with interest. *Walsh v. Colvin*..... 309
16. VENDOR AND PURCHASER—BREACH—REMEDIES OF VENDEE—RECOVERY OF PRICE. Where vendors extended the time of payment of installments on a land contract, of which time was not the essence, so that there was no forfeiture, a vendee is entitled to recover payments made after the vendors have put it out of their power to convey by deeding the land to another. *Eby v. Larkin*..... 454
17. VENDOR AND PURCHASER—BREACH—DAMAGES—REMEDIES OF VENDEE—DEFENSES. A vendee cannot recover damages for breach of a contract to convey land, induced by false representations of the vendor that he was a single man, where the vendee was in default in his payments, and the vendor gave notice of forfeiture under the terms of the contract, there being no evidence that the vendor's wife refused to join in a deed or claimed any interest in the property. *Cash v. Meisenheimer*..... 576

VENDOR AND PURCHASER—CONTINUED.

18. VENDOR AND PURCHASER—CONTRACT—BREACH—DEFECTS IN TITLE.

The evidence is sufficient to sustain findings that a vendor breached a contract by reason of defects in his title, where it appears that he admitted defects which he unsuccessfully attempted to cure. *Babcock, Cornish & Co. v. Urquhart*..... 168

19. VENDOR AND PURCHASER—REMEDIES OF VENDEE—FAILURE OF TITLE—MEASURE OF DAMAGES.

The measure of damages on breach of covenant as to title, is the purchase price paid, and expenses incurred in pursuance of the contract, with interest, without any sum for loss of profits, where, upon failure of the vendor's title, there were no fraudulent representations as to the state of the title, which was to some extent known by the vendee, and the vendors acted in good faith and attempted to perfect the title. *Babcock, Cornish & Co. v. Urquhart*..... 168

20. SAME—MEASURE OF DAMAGES—IMPROVEMENTS BY VENDEE. In an action to rescind a sale of land for failure of title, the measure of damages is the purchase price paid, with interest from the date of payment, and the reasonable value of improvements placed on the land by the vendees before they learned of the defective title, where the vendor represented that the title was clear and knew that the vendees intended to improve the property. *Snarski v. Washington State Colonization Co.*..... 221

VENUE:

Action against foreign corporation, see CORPORATIONS, 10.

Remedy for improper change or denial, see PROHIBITION.

VERDICT:

Review on appeal or writ of error, see APPEAL AND ERROR, 25.

VICE PRINCIPALS:

See MASTER AND SERVANT, 6-10, 20.

VOLUNTARY NONSUIT:

See DISMISSAL AND NONSUIT.

WAIVER:

See ESTOPPEL.

Of error, see APPEAL AND ERROR, 13, 14, 17.

By appearance, see APPEARANCE.

Of time limit for sale of property, see BROKERS, 3.

Of election of remedies, see ELECTION OF REMEDIES, 2.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 5.

Of premiums by company, issues and proof, see INSURANCE, 11.

WAIVER—CONTINUED.

Extension of loan as waiver of right to cancel policy pledged as security, see **INSURANCE**, 7.

To assert invalidity of assessment, see **TAXATION**, 3.

Of tender in action to set aside tax sale, see **TAXATION**, 11.

By vendor of rescission of contract for sale of land, see **VENDOR AND PURCHASER**, 2.

WAREHOUSEMEN:

1. **WAREHOUSEMEN—BAILMENT—CONSTRUCTION OF CONTRACT—TRIAL—QUESTION OF LAW.** Under an agreement reciting that the defendant rented to the plaintiff a certain cold storage room to be used for storing beef, for a certain sum per month or in proportion to space used, the relationship of the parties is that of bailor and bailee, and is to be determined by the court as a matter of law; and it is misleading and error to submit to the jury the question whether the relation was that of landlord or warehouseman, although such relations were properly defined. *Patterson v. Wenatchee Canning Co.* 155
2. **WAREHOUSEMEN—BAILMENT—LIABILITIES—PRESUMPTION OF NEGLIGENCE.** In an action against a cold storage company for negligence in the storage of beef, there is no presumption of negligence from the fact that the beef was received in good condition and had spoiled when delivery was made; since from the nature of the chattel it may deteriorate or perish without negligence on the part of the bailee. *Patterson v. Wenatchee Canning Co.*..... 155
3. **SAME—DAMAGES—MEASURE—INJURY TO PROPERTY.** The measure of damages for negligence by a bailee for hire in the storage of beef is to be determined by the fair market value of the beef at the time it was sold when the bailment ended, and not at the time at which plaintiff intended to sell it. *Patterson v. Wenatchee Canning Co.* 155
4. **WAREHOUSEMEN—LIEN—CHARGES—EVIDENCE—PAYMENT—SUFFICIENCY.** In an action of replevin for a piano held for storage charges, the evidence is insufficient to justify a verdict for the plaintiff, where it appears that he refused to pay a balance due of \$40, necessary to discharge defendant's lien for charges, for the reason that a few days before he had paid within \$1.95 of the charges said to be due at that time, and had been assured the further cost of cartage on removal of the goods would not exceed \$25, where there was no attempt to show that the charges were unreasonable or the services charged for not rendered; as defendant's previous statement did not preclude proper additional charges. *George v. Bekins Moving & Storage Co.* 430

WARRANTY:

Covenants of, see **COVENANTS**.

WASTE:

As ground for cancellation of lease, see **LANDLORD AND TENANT**.

WATERS AND WATER COURSES:

Exercise of power of eminent domain, see **EMINENT DOMAIN**, 1, 4, 10, 11.

Works for protection or improvement of lands, see **DRAINS**.

1. **WATERS AND WATER COURSES—WHAT ARE—LAKES—OBSTRUCTION—INJUNCTION—DAMAGES—EVIDENCE—SUFFICIENCY.** A dam causing the overflow of lands bordering upon a depression, swamp or lake, is an unlawful obstruction of a natural water course, and not a mere protection against surface waters, where it appears that the depression or lake was practically a continuation of, and received the overflow from, another lake, and that the water course had a well defined channel, was the natural outlet of the lakes, and was the only means of discharging the waters thereof during high water season; and such obstruction will be enjoined, with damages for its maintenance. *Hastie v. Jenkins*..... 21

WITHDRAWAL:

Of plea of guilty, see **CRIMINAL LAW**, 1.

WITNESSES:

Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 30.

Testimony of accomplices, see **CRIMINAL LAW**, 2.

Interpreters in criminal cases, see **CRIMINAL LAW**, 3.

Weight and sufficiency of evidence in general, see **EVIDENCE**, 6.

1. **WITNESSES—CROSS-EXAMINATION—CONVICTS—TRUE NAME OF WITNESSES—MATERIALITY.** Upon cross-examination of a state's witness, who had been convicted as a participant in the crime under an assumed name and admitted perjury on his own trial, his true name is not material to the issue, and it is not an abuse of discretion to refuse to require him to state it, where accused had the full benefit of cross-examination. *State v. Jones*..... 142

WOODS AND FORESTS:

Statute of frauds as affecting validity of sale of growing trees, see **FRAUDS, STATUTE OF**, 2.

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS**.

Statute limiting hours of labor of employees of common carrier, see **STATUTES**, 2.

WRITS:

See **INJUNCTION; PROCESS; PROHIBITION**.

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